LIBRARY
SUPREME COURT, U. S.

FILED
SEP 5 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 19..

No. . . 558 . . .

HOUSTON H. FEASTER, individually and as Director Alabama State Docks Department, and the STATE OF ALABAMA,

Petitioners,

versus

UNITED STATES OF AMERICA and WARREN S. LANE, as Mediator, National Mediation Board,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MacDONALD GALLION,
As Attorney General of the
State of Alabama,

WILLIS C. DARBY, JR.,
Post Office Box 2565,
Mobile, Alabama 36601,
Counsel for Petitioners.

INDEX.

Page

CITATIONS TO OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 4

STATEMENT 5

The Proceedings Below 5

The Alabama State Docks Department 6

REASONS FOR GRANTING THE WRIT 9

1. The questions presented are of importance in administering the various acts of Congress regulating the railroad world and labor relations at the many publicly owned and operated ports 9

2. The decision below should be reviewed because it erroneously interprets the Railway Labor Act as to deprive publicly operated ports and others of their status as being exempt from the various acts of Congress regulating the railroad world without a hearing in violation of the Due Process Clause of the Fifth Amendment 12

INDEX—(Continued):

Page

3. The decision below appears to be in conflict with Shields v. Utah Idaho Central Railroad Company, 305 US 177, 184 (1938) and other applicable decisions of this Court 14

4. The decision of the Court below is believed to be erroneous and will foster labor strife 15

CONCLUSION 17

CERTIFICATE OF SERVICE 18

APPENDIX A:

Findings of Fact and Conclusions of Law of District Court entered April 8, 1968 19

Order of District Court Granting Preliminary Injunction and Denying Motion to Dismiss Counterclaim entered April 9, 1968 32

APPENDIX B:

Opinion of Court of Appeals entered May 5, 1969 35

Judgment 72

Order Denying Petition for Rehearing entered June 10, 1969 72

INDEX—(Continued):

Page

APPENDIX C:

Opinion of Court of Appeals entered March 29, 1967 73

APPENDIX D:

Opinion of Court of Appeals entered April 20, 1964 85

APPENDIX E:

Constitutional Provisions

Article I, Section 9, Clause 6, Powers Denied to Congress—Preference to Ports 94

Due Process Clause, Fifth Amendment 94

APPENDIX F:

Section 1, First of the Railway Labor Act, 45 U.S.C. 151, First 94

APPENDIX G:

Section 1, Fifth of the Railway Labor Act, 45 U.S.C. 151, Fifth 95

APPENDIX H:

Section 2, Ninth of the Railway Labor Act, 45 U.S.C. 152, Ninth 96

INDEX—(Continued):

Page

APPENDIX I:

Section 1(3)(a) of the Interstate Commerce Act, 49 U.S.C. 1(3)(a) 98

APPENDIX J:

Section 1(a) of the Railroad Retirement Tax Act, 26 U.S.C. 3231(a) and (g) 99

APPENDIX K:

Section 1(a) of the Railroad Retirement Act of 1937, 45 U.S.C. 228a(a) 101

APPENDIX L:

Railroad Unemployment Insurance Act, 45 U.S.C. 351(a), (b) and (c) 102

APPENDIX M:

Federal Insurance Contributions Act (Social Security Act), 26 U.S.C. 3121(b)(9) 104

APPENDIX N:

National Labor Relations Act, 29 U.S.C. 152(2) . . . 105

APPENDIX O:

Fair Labor Standards Act, 29 U.S.C. 201 106

INDEX—(Continued):

Page

APPENDIX P:

Legislative History of the Railway Labor Act As Amended 106

APPENDIX Q:

Pub. L. No. 764, 76th Cong., 3d Sess. (Aug. 13, 1940), 54 Stat. 785 107

APPENDIX R:

National Mediation Board File No. C-3865 Notice of Hearing, Harris County Houston Ship Channel Navigation District, June 13, 1969 113

APPENDIX S:

National Mediation Board File No. C-3899 Notice of Hearing, South Carolina State Ports Authority, June 13, 1969 116

APPENDIX T:

National Mediation Board File No. C-3900 Notice of Hearing, North Carolina State Ports Authority, June 13, 1969 119

INDEX—(Continued):

Page

APPENDIX U:

National Mediation Board File No. C-3902 Notice of Hearing, Savannah State Docks Railroad Company, June 13, 1969 122

APPENDIX V:

Excerpts from Memorandum for the United States in Opposition, Feaster v. United States of America, 389 US 920 (1967) 125

LIST OF AUTHORITIES.

Cases:

Armour & Company v. Alton Railroad Company, 312 US 195, 197, 201 (1941) 10, 13

Atchison, Topeka & Santa Fe Railway Company v. United States, 295, US 193, 201-02 (1935) 14

Burlington Truck Lines v. United States, 371 US 156, 168-69 (1962) 14

California v. Taylor, 353 US 553, 565 (1957) 10

Centraal Stikstof Verkoopkantoor, N. V. v. Alabama State Docks Department and Gulf American Fire & Casualty Company, decided August 15, 1969, ... F.2d . . . ., (5 Cir., 1969) 13

County of Allegheny v. Frank Mashuda Company, 360 US 185 (1959), reh. denied, 361 US 855 16

LIST OF AUTHORITIES—(Continued):

Page

Cases—(Continued):

Donora Southern Railroad Co., 2 N.M.B.80 12
Garner v. Teamsters, 346 US 485, 490-91 (1953) 10
Leedom v. Kyne, 358 US 184 (1958) 15
Marine Engineers Beneficial Association v. Interlake Steamship Association, 370 US 173 (1962) 10
Martin v. Creasy, 360 US 219, 225 (1959) 16
McCullough v. Sociedad Nacional de Marineros de Honduras, 372 US 10 (1963) 15
Mobile Steamship Association (International Longshoremen and Warehousemen's Union), 8 N.L.R.B. 1297, 1318 13
National Labor Relations Board v. Allis-Chalmers Manufacturing Company, 388 US 175, 184 (1967) 16
Railway Employees' Department v. Hanson, 351 US 225, 234 (1956) 10, 16
Railway Mail Association v. Corsi, 326 US 88, 95 (1945) 15
Shields v. Utah Idaho Central Railroad Company, 305 US 177, 184 (1938) 10, 13, 14, 15
Sniadach v. Family Finance Corp., 395 US 337 (1969) 13
Swift & Company v. United States, 316 US 216 (1942) 11
Union Stockyard and Transit Company v. United States, 308 US 213 (1939) 10
United States v. Feaster, 330 F2d 671 (5 Cir., 1964) 11

LIST OF AUTHORITIES—(Continued):

Page

Cases—(Continued):
United States v. Jackson, 280 US 183, 193 (1930) 16
United States v. The Alabama Great Southern Railroad Company, 142 US 615, 621 (1892) 16
United States v. Western Pacific Railroad Company, 352 US 59, 63-65 (1956) 14
United States Navigation Company v. Cunard Steamship Company, 284 US 474 (1932) . . . 11

Constitutions:
Constitution of the United States
Fifth Amendment, Due Process Clause 12
Article I, Section 9, Clause 6, Powers Denied to Congress—Preference to Ports 16

Statutes:
Code of Alabama 1940 (Recompiled 1958) Title 55, Chapter 9 7
Federal Insurance Contributions Act
26 U.S.C. 3121, et seq. 7
Interstate Commerce Act
49 U.S.C. 20(1)-(9) 11
49 U.S.C. 20(11) 13
Judiciary and Judicial Procedure
28 U.S.C. 1254(1) 2
28 U.S.C. 1337 5
28 U.S.C. 1345 5
National Labor Relations Act
29 U.S.C. 152(2) 13, 15

LIST OF AUTHORITIES—(Continued):

Page

Statutes—(Continued):

Railway Labor Act
45 U.S.C. 151, et seq. 8
45 U.S.C. 151, First 11
45 U.S.C. 151, Fifth 11

Railroad Retirement Tax Act
26 U.S.C. 3201, et seq. 8

Railroad Unemployment Insurance Act
45 U.S.C. 351, et seq. 8

Rivers and Harbors Appropriation Act of 1919
40 Stat. 1275, 1286 (1919) 6

Shipping Act of 1916, as amended
46 U.S.C. 801, et seq. 7

Social Security Act
42 U.S.C. 301, et seq. 7

Miscellaneous:

Legislative History of the Rivers and Harbors Appropriation Act of 1919
57 Cong. Rec. 3543, 3549 (1919) 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19..

No. .....

HOUSTON H. FEASTER, individually and as Director Alabama State Docks Department, and the STATE OF ALABAMA,

Petitioners,

versus

UNITED STATES OF AMERICA and WARREN S. LANE, as Mediator, National Mediation Board,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause on the 5th day of May, 1969.

CITATIONS TO OPINIONS BELOW.

The opinion of the district court is unreported and is printed in Appendix A, p. 19 *infra*. The opinion of the circuit court is reported at .... F.2d .... and 71 LRRM 2218 and is printed in Appendix B, p. 35 *infra*. The opinion of

the circuit court on the second appeal in this cause is reported at 376 F.2d 147, cert. denied, Mr. Justice Douglas dissenting, 389 US 920, and is printed in Appendix C, p. 73 *infra*. The opinion of the circuit court on the first appeal in this cause is reported at 330 F.2d 671 and is printed in Appendix D, p. 85 *infra*.

JURISDICTION.

The opinion of the circuit court was entered on May 5, 1969. (Appendix B, p. 35 *infra*.) Rehearing was denied on June 10, 1969. (Appendix B, p. 72 *infra*; R. Doc. 6.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED.

1. Does a district court have jurisdiction to enjoin an election by the National Mediation Board among employees of a state owned and operated port facility (a) where the National Mediation Board, over the objection of the state and without hearing, determined (1) that the state was a "carrier" within the meaning of the Railway Labor Act, and (2) that the employees of the state operated port facilities were employees who performed "work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission", (b) where there was and is a material issue as to "carrier" and "employee" status and (c) where all other federal agencies, including the Interstate Commerce Commission, the Federal Maritime Commission and the Internal Revenue Service, charged with administering the acts of Congress regulating

the railroad world have, since the inception of the port facilities in 1928, and do now recognize that the state owned and operated port facilities and the employees of such port facilities are not subject to the acts of Congress regulating and taxing the railroad world?

2. Is a state which owns and operates a port facility that has been uniformly recognized as being exempt from the acts of Congress regulating and taxing the railroad world, entitled to a hearing pursuant to the Due Process Clause of the Fifth Amendment before its status is changed to that of a "carrier" subject to the acts of Congress regulating the railroad world?

3. Should the Interstate Commerce Commission or some other federal agency having expertise in the transportation field have exclusive authority to determine "carrier" and "employee" status under the several acts of Congress regulating and taxing the railroad world?

4. May Congress, consistent with Article I, Section 9, Clause 6 of the Constitution, subject some but not all publicly owned ports to the acts of Congress regulating the railroad world?

5. Does a district court have jurisdiction to review a determination by the National Mediation Board of "carrier" and "employee" status prior to the holding of an election by the National Mediation Board?

6. Are the employees of the State of Alabama who operate the port facilities of the State "employees" within the meaning of the Railway Labor Act?

7. Is the State of Alabama a "carrier" within the meaning of the Railway Labor Act in connection with its ownership and operation of the public port facilities at Mobile?

8. Does the district court have power to review the National Mediation Board's determinations of carrier and employee status in this cause prior to an election?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional and statutory provisions directly involved are the Due Process of Law Clause of the Fifth Amendment to the Constitution of the United States, Appendix E, p. 94 *infra*; Article I, Section 9, Clause 6 of the Constitution of the United States, Appendix E, p. 94 *infra*; Section 1, First, of the Railway Labor Act, 45 U.S.C. 151 First, Appendix F, p. 94 *infra*; Section 1, Fifth of the Railway Labor Act, 45 U.S.C. 151, Fifth, Appendix G, p. 95 *infra*; and Section 2, Ninth of the Railway Labor Act, 45 U.S.C. 152 Ninth, Appendix H, p. 96 *infra*. The following statutory provisions are also involved: Section 1(3)(a) Interstate Commerce Act, 49 U.S.C. 1(3)(a), Appendix I, p. 98 *infra*; Section 1(a) Railroad Retirement Tax Act, 26 U.S.C. 3231(a) and (g), Appendix J, p. 99 *infra*; Section 1(a) Railroad Retirement Act of 1937, 45 U.S.C. 228(a), Appendix K, p. 100 *infra*; Section 1(a) Railroad Unemployment Insurance Act, 45 U.S.C. 351 (a), (b) and (c), Appendix L, p. 102 *infra*; Federal Insurance Contributions Act (Social Security Act), 26 U.S.C. 3121(b)(9), Appendix M, p. 104 *infra*; National Labor Relations Act, 29 U.S.C. 152(2), Appendix N, p. 105 *infra*; and Fair Labor Standards Act, 29 U.S.C. 201, Appendix O, p. 106 *infra*.

STATEMENT.

A.

The Proceedings Below.

The United States brought this action pursuant to 28 U.S.C. 1345 against the State of Alabama and certain of its executive officers to require the State to make the books and records of the publicly owned and operated port facilities at Mobile available to the National Mediation Board (Mediation Board) to enable the Mediation Board "to make a threshold determination of jurisdiction" over the public port facilities. (Memorandum for the United States in Opposition, p. 5, *Feaster v. United States,* 389 US 920 (1967); Appendix V, p. 125 *infra.*) The Fifth Circuit directed the entry of an order granting the Mediation Board access to the records. (Appendix C, p. 80 *infra.*) This Court denied certiorari, Mr. Justice Douglas dissenting, 389 US 920. The State furnished the Mediation Board with the books and records pertaining to the port facilities of the State. (R. Doc. 2, p. 66a; Appendix A, p. 26 *infra.*) On March 8, 1968, without affording the State a hearing on the "threshold" question of jurisdiction, The Mediation Board scheduled an election among the employees of the public port facilities to ascertain whether the employees desired to be represented by the International Brotherhood of Firemen and Oilers, AFL-CIO, International Longshoremen's Association, AFL-CIO, or any other organization or individual. (R. Doc. 2, p. 27a; Appendix A, pp. 26-7 *infra.*) The State, by compulsory counterclaim and invoking the jurisdiction of the District

Court under Section 1337 of Title 28, United States Code, sought a declaratory judgment that the State was not a "carrier" and a temporary and permanent injunction enjoining the Mediation Board from conducting an election. (R. Doc. 2, pp. 1a-28a.) The district court enjoined the election on the ground that the public port facilities were "not subject to the Railway Labor Act." (Appendix B, pp. 39-40 *infra*.) The circuit court concluded that the Mediation Board's jurisdictional determination of carrier status "was (not) error of the *magna* or *summa* quality necessary to vest the district court with jurisdiction . . . to enter the injunction prohibiting the Mediation Board from holding the representation election." (Appendix B, p. 71 *infra*.)

B.

The Alabama State Docks Department.

In 1919 Congress declared that at least one public water "terminal should exist, constructed, owned, and regulated by . . . (a) public agency of the State and open to the use of all on equal terms" at every city located at a harbor or navigable waterway throughout the United States. (Rivers and Harbors Appropriation Act of 1919, 40 Stat. 1275, 1286 (1919); R. Doc. 1, pp. 97-98; Appendix A, pp. 21-2 *infra*.) One of the primary purposes for the development of rivers and harbors by the federal government has been to provide navigable waterways open to the use of all on equal terms for the purpose of reducing railroad rates. (57 Cong. Rec. 3543, 3549 (1919); R. Doc. 1, pp. 98-99; Appendix A, p. 22 *infra*.) In furtherance of this national policy, the State authorized, constructed and has, since 1928, operated and

maintained with State employees public port facilities at Mobile, including general cargo piers, warehouses, a special facility for unloading bulk ores from vessels and barges, grain elevators, a cold storage plant, cotton compress, and a facility for the storage and loading of edible fats and oils (R. Doc. 1, pp. 99-105; Appendix A, p. 22 *infra*; Appendix C, pp. 80-81 *infra*.)

The general cargo piers, warehouses, bulk ore facilities, grain elevators, cold storage plant and cotton compress handle substantial quantities of goods and commodities which have not been shipped or received by rail; all file tariffs with the Federal Maritime Board pursuant to the requirements of the Shipping Act of 1916, as amended, 46 U.S.C. 801, et seq.; none file tariffs or reports with the Interstate Commerce Commission; the employees of the facilities are civil service employees of the State and are covered by the State's "Merit System." Title 55, Code of Alabama, 1940 (Recompiled 1958), Chapter 9. Employees of the maritime facilities are now and have been subject to the Social Security Act, Section 301, et seq., of Title 42 of the United States Code; and the State has been and is now paying Social Security taxes to the United States pursuant to the Federal Insurance Contributions Act, Sections 3121, et seq., of Title 26 of the United States Code on all of these employees. (R. Doc. 1, pp. 100-05, 107-08; Appendix A, p. 22 *infra*.)

The State created and operates the Terminal Railway Alabama State Docks (Terminal Railway) for the purpose of serving the public port facilities to insure that these facilities will always be "open to the use of all on equal terms." (R. Doc. 1, pp. 97, 99; Doc. 2, p. 3a; Appendix C,

p. 81 *infra*; Appendix A, p. 22 *infra*.) The Terminal Railway is a separate, distinct and identifiable facility of the State. In addition to serving the port facilities of the State, the Terminal Railway serves private industries located on or adjacent to property owned by the State in the vicinity of the port facilities. The Terminal Railway operates under a certificate of convenience and necessity issued by the Interstate Commerce Commission; its books and records are kept in conformity with the uniform system of accounts established by the Interstate Commerce Commission; it files an annual report of all of its activities with the Interstate Commerce Commission. Since 1950 all of the employees of the Terminal Railway have worked under collective bargaining agreements with and have been and are now represented by "labor organizations, national in scope," authorized to represent employees of railroads pursuant to the Railway Labor Act, Section 151, et seq., of Title 45 of the United States Code; only employees of the Terminal Railway are covered by these collective bargaining agreements. The Terminal Railway pays taxes to the United States on each of its employees and officials pursuant to the Railroad Retirement Tax Act, Section 3201, et seq., of Title 26 of the United States Code and the Railroad Unemployment Insurance Act, Section 351, et seq., of Title 45 of the United States Code. The Terminal Railway performs switching services only. Switching services performed by the Terminal Railway consist of moving railroad cars from one point to another in interchange tracks maintained jointly by the Terminal Railway and line haul carriers, tracts of the Terminal Railway and private tracks. All of the compensation of the Terminal Railway is derived from switching and demurrage; the Terminal Rail-

way does not receive any compensation as an originating carrier or as a line haul carrier. All Terminal Railway tariffs are on file with the Interstate Commerce Commission. The Terminal Railway is admittedly a "carrier" within the meaning of the acts of Congress regulating the "railroad world." R. Doc. 1, pp. 110-15; R. Doc. 2, pp. 3a-5a; Appendix A, pp. 23-4 *infra*.)

None of the port facilities of the State perform any service for the Terminal Railway in connection with the transportation of property by railroad or in connection with the receipt, delivery, elevation, transfer in transit, refrigeration, icing, storage or handling of property transported by railroad. (R. Doc. 1, p. 114; R. Doc. 2, p. 5a; Appendix A, p. 24 *infra*.) The Terminal Railway makes no distinction between various port facilities of the State and private industries; all are treated equally. Demurrage and other charges are assessed against and collected from the port facilities pursuant to the same rules as demurrage is assessed against private industries. (R. Doc. 1, pp. 114-15; R. Doc. 2, p. 5a; Appendix A, p. 24 *infra*.)

REASONS FOR GRANTING THE WRIT.

1. The questions presented are of importance in administering the various acts of Congress regulating the railroad world and labor relations at the many publicly owned and operated ports.

Congress separated the railroad industry from all other industries for the purposes of economic regulation, welfare of employees and regulation of labor relations. The

"railroad world" has been described as "a state within a state." *California v. Taylor*, 353 US 553, 565 (1957). The acts of Congress regulating and taxing the railroad world and the acts that regulate and tax all other industries are mutually exclusive; the two regulatory and taxing schemes do not apply to the same facility. *Shields v. Utah Idaho Central Railroad Company*, 305 US 177, 184 (1938).

In this age of industry-wide bargaining, the uniform fixing of the status of facilities performing the same function appears essential to industrial peace and stabilized labor relations in the publicly owned and operated ports around the nation as "the ingredients of industrial peace and stabilized labor-management relations . . . may well vary . . . from industry to industry." *Railway Employees' Department v. Hanson*, 351 US 225, 234 (1955).

A centralized adjudicating process is essential to fixing the status of the many facilities that may arguably be a part of the railroad world if the congressional scheme of separate regulation and taxation of railroads is to operate as a coherent whole as "a multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner v. Teamsters*, 346 US 485, 490-91 (1953); *Marine Engineers Beneficial Association v. Interlake Steamship Association*, 370 US 173 (1962). The Interstate Commerce Commission has long been recognized as the only agency possessing the expertise necessary to construe the statutes and gather and evaluate evidence relevant to determine "carrier" status. *Armour & Company v. Alton Railroad Company*, 312 US 195, 197 (1941); *Union*

Stockyard and Transit Company v. United States, 308 US 213 (1939); *Swift & Company v. United States*, 316 US 216 (1942); Compare: *United States Navigation Company v. Cunard Steamship Company*, 284 US 474 (1932).

Congress recognized that the Mediation Board was not competent to determine "carrier" and "employee" status under the Railway Labor Act when it authorized and directed the Interstate Commerce Commission to determine after hearing whether a "street, interurban, or suburban electric railway" was operating as a part of the general steam railroad system of transportation, 45 U.S.C. 151, First, and when it confined the definition of the term "employee" to one "who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission . . ." 45 U.S.C. 151, Fifth. An apparent explanation for the absence of any provision in the Railway Labor Act affirmatively requiring the Mediation Board to submit all issues of carrier status to the Interstate Commerce Commission is that Congress assumed that all carriers would be filing reports of all of their transportation-connected activities with the Interstate Commerce Commission pursuant to 49 U.S.C. 20(1)-(9). Indeed, the Mediation Board appears to have initially adopted the logical position that it had jurisdiction over those entities and only those entities that reported to the Interstate Commerce Commission.[1]

[1] Brief of Appellant, p. 11, *United States v. Feaster*, 330 F.2d 671 (5 Cir., (1964):

> Underlying the statutory description of a representation dispute within the coverage of the Railway Labor Act is a complex of required elements whose presence depends upon action by two di-

2. The decision below should be reviewed because it erroneously interprets the Railway Labor Act as to deprive publicly operated ports and others of their status as being exempt from the various acts of Congress regulating the railroad world without a hearing in violation of the Due Process Clause of the Fifth Amendment.

Prior to 1959, all agencies of the United States charged with administrating the acts of Congress regulating and taxing the railroad world and the balance of our industrial society recognized that the publicly owned and operated port facilities here involved were not a part of the railroad world, but were subject to the other world's scheme of regulation and taxation. Except for the Mediation Board, all federal agencies continue to recognize that the facilities here involved are public port facilities and therefore not subject to statutes applicable to railroads.

The assertion of jurisdiction by the Mediation Board deprives the State of its federally protected right, if not a carrier, to formulate and carry out labor relations poli-

---

verse bodies, the Interstate Commerce Commission and the National Mediation Board.

* * *

Thus, in the first instance the Interstate Commerce Commission must act—pursuant to its duties under the Interstate Commerce Act, as amended, 49 U.S.C. §§ 1, *et seq.*—to compel compliance with the reporting requirements of that Act.

In *Representation of Employees of the Donora Southern Railroad Co.*, 2 N.M.B. 80, 84, 86, the Mediation Board held that:

any carrier reporting separately to the Interstate Commerce Commission must, under the law, be considered by the Board as a separate carrier for representation purposes under Section 2, Ninth, of the Act.

and that for representation purposes employees:

must be regarded . . . as the employees of the carrier which reports to the Interstate Commerce Commission . . . .

cies pertaining to the operation of its port facilities without federal interference.[2] The State has a legally protected interest in maintaining its status outside the railroad world. *Shields v. Utah Idaho Central Railroad Company*, 305 US 177, 184 (1938). This legally protected interest entitles the State to "one of the most fundamental requisites of due process—the right to be heard" before, not after, its status is changed and its rights invaded. *Sniadach v. Family Finance Corp.*, 395 US 337 (1969). Compare *Armour & Company v. Alton Railroad Company*, 312 US 195, 201 (1941), where this Court held that "before such long-standing transportation customs can be held illegal (changed), it is of course necessary that evidence be heard."

Moreover, the failure of the Mediation Board to hold a hearing and make findings renders meaningful judicial review of the Mediation Board's action impossible and forces some other fact finding body, in the first instance, either before or after an election, to conduct a hearing on the

---

[2] The National Labor Relations Act does not regulate the labor relations of "any State or political subdivision thereof . . . or any person subject to the Railway Labor Act." 29 U.S.C. 152(2). In *Mobile Steamship Association* (International Longshoremen and Warehousemen's Union), 8 N.L.R.B. 1297, 1318, the National Labor Relations Board exercised its expertise and found that the facilities here involved were "a division of the State of Alabama" and therefore not an "employer" within the meaning of the National Labor Relations Act. Parenthetically, had these facilities been subject to the Railway Labor Act, the National Labor Relations Board would have declined jurisdiction on that ground. In *Centraal Stikstof Verkoopkantoor, N.V. v. Alabama State Docks Department and Gulf American Fire & Casualty Company*, decided August 15, 1969, ... F.2d ...., (5 Cir., 1969), the Court held that the Alabama State Docks Department was not "a common carrier under the Interstate Commerce Act" and therefore not subject to suit under the Carmack Amendment, Title 49, U.S.C. 20(11) for damage to goods stored in a warehouse operated by the Department.

merits, be the merits called carrier status or the jurisdiction of the Mediation Board to conduct an election among the employees of the State. *Atchison Topeka & Santa Fe Railway Company v. United States*, 295 US 193, 201-02; *United States v. Western Pacific Railroad Company*, 352 US 59, 63-65.

Moreover, it appears that the court of appeals ignored a cardinal rule of administrative law when it "concluded that the Mediation Board's determination was not clearly 'made in excess of its delegated powers and contrary to a specific prohibition in the Act' " because nothing was before the court to reveal the evidence, ultimate facts or reasoning that resulted in the Mediation Board's finding of "carrier" status. *Burlington Truck Lines v. United States*, 371 US 156, 168-69.[3]

3. The decision below appears to be in conflict with *Shields v. Utah Idaho Central Railroad Company*, 305 US 177, 184 (1938) and other applicable decisions of this Court.

In *Shields* this court squarely held that an alleged carrier "was entitled to resort to equity in order to obtain a judicial review of the questions of the validity and effect of the

[3] The Mediation Board appears to have recognized that it erred in failing to afford the State a hearing on "carrier" status. On June 13, 1969, the Mediation Board issued notices of hearing to determine if the public authorities operating the ports of Wilmington and Morehead City, North Carolina, Charleston, South Carolina, Savannah, Georgia, and Houston, Texas, were "subject to the jurisdiction of the Railway Labor Act . . . ." (Appendix R, p. 113 *infra*; Appendix S, p. 116 *infra*; Appendix T, p. 119 *infra*; Appendix U, p. 122 *infra*.)

(Interstate Commerce) Commission's determination purporting to fix its status." *Shields v. Utah Idaho Central Railroad Company*, 305 US 177, 184 (1938). It is significant that in *Shields* the review came before any action was taken by the Mediation Board to hold an election.

Where, as here, the question on the merits has been the jurisdiction of the electoral agency to conduct the election, this Court has permitted judicial review prior to the election. *Leedom v. Kyne*, 358 US 184 (1958); *McCullough v. Sociedad Nacional de Marineros de Honduras*, 372 US 10 (1963).

4. The decision of the Court below is believed to be erroneous and will foster labor strife. This Court has recognized that under "customary practices government employees do not bargain collectively with their employer." *Railway Mail Association v. Corsi*, 326 US 88, 95 (1945). Congress recognized that federal labor laws should not interfere with the right of a state to fix the terms and conditions of employment of governmental employees engaged in interstate commerce when it excluded "any State or political subdivision thereof" from the definition of "employer" in the National Labor Relations Act, 29 U.S.C. 152(2).

No reason exists for bringing the employees of the State of Alabama who operate the maritime facilities of the State out of the legal area occupied by the employees of other public ports, including the Ports of New Orleans and Norfolk, and placing them for employment relation purposes in the "state within a state" that is the "railroad world." Nothing in the Railway Labor Act or the legislative history periph-

erally indicates that Congress intended such an absurd result. *National Labor Relations Board v. Allis-Chalmers Manufacturing Company*, 388 US 175, 184 (1967). Indeed, application of the Railway Labor Act to public ports might destroy the "industrial peace and stabilized labor-management relations" that have existed at the publicly owned and operated port facilities at Mobile since 1928. *Cf. Railway Employees' Department v. Hanson*, 351 US 225, 234 (1955).

The "contemporaneous construction" given by all governmental agencies regulating and taxing our industrial society and providing social benefits for employees from 1928 until 1959 and by all except the Mediation Board since 1959, should not "be overturned unless clearly wrong, or unless a different construction is plainly required." *United States v. Jackson*, 280 US 183, 193 (1930); *United States v. The Alabama Great Southern Railroad Company*, 142 US 615, 621 (1892). Certainly, federal agencies, like federal courts, should not "create the hazard of unsettling some delicate balance in the area of federal-state relationships," particularly where the subject matter is intimately involved with sovereign perogative. *County of Allegheny v. Frank Mashuda Company*, 360 US 185 (1959), reh. denied, 361 US 454; *Martin v. Creasy*, 360 US 219, 225 (1959).[4]

[4] Moreover, the application of laws applicable to railroads to the public port facilities at Mobile might well amount to an unlawful preference to public ports which are allowed to remain outside the railroad world. "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another." U.S. Const. art. I, §9, clause 6.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

.....

WILLIS C. DARBY, JR.,
Post Office Box 2565,
Mobile, Alabama.

MacDONALD GALLION,
As Attorney General of
the State of Alabama.

September , 1969.

CERTIFICATE OF SERVICE.

I, Willis C. Darby, Jr., one of the attorneys for Houston H. Feaster, individually and as Director, Alabama State Docks Department and the State of Alabama, petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ... day of September, 1969, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the several parties thereto, as follows:

On the United States and on Warren S. Lane, as Mediator, National Mediation Board, by leaving a copy thereof at the office of Charles S. Whitespunner, Esquire, United States Attorney for the Southern District of Alabama, at Room 311, Federal Building, Mobile, Alabama, and by mailing a copy in a duly addressed envelope with air mail postage prepaid to The Solicitor General, Department of Justice, Washington, D. C. 20530.

.....

WILLIS C. DARBY, JR.,
Attorney for Petitioners,
Post Office Box 2565,
Mobile, Alabama 36601.

OF COUNSEL:

MacDONALD GALLION,
As Attorney General of
the State of Alabama.

APPENDICES

APPENDIX A.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION No. 2685.

UNITED STATES OF AMERICA,
Plaintiff,

versus

HOUSTON H. FEASTER, individually and as Director, Alabama State Docks Department, C. U. IRVINE, individually and as General Manager, Operations, Alabama State Docks Department, and the STATE OF ALABAMA,
Defendants,

by original summons and between the said

HOUSTON H. FEASTER, individually and as Director, Alabama State Docks Department, and the STATE OF ALABAMA,
Plaintiffs,

versus

UNITED STATES OF AMERICA, WARREN S. LANE, individually and as Mediator, National Mediation Board, and VERNOL R. JANSEN, JR., individually

and as United States Attorney for the Southern District of Alabama,

Defendants,

by counterclaim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on to be heard on March 29, 1968, on the motion for a preliminary injunction filed by Houston H. Feaster, individually and as Director, Alabama State Docks Department, (Feaster), and the State of Alabama, and the motion of the United States of America, Warren S. Lane, individually and as Mediator, National Mediation Board, (Lane), and Vernol R. Jansen, Jr., individually and as United States Attorney for the Southern District of Alabama, (Jansen), to dismiss the supplemental answer containing counterclaims filed by Feaster and the State of Alabama. The Court has fully considered the pleadings, affidavits, briefs and arguments of counsel. Upon the entire record, the Court makes the following

Findings of Fact.

1. The State of Alabama (State) is a sovereign state of the United States.

2. The Alabama State Docks Department (Department) is an executive department of the State of Alabama. The Department operates the publicly owned port facilities (maritime facilities) at Mobile, Alabama, which include general cargo piers and warehouses, bulk material handling

plant, grain elevator, cotton compress and warehouse and cold storage plant. The Department also operates the Terminal Railway Alabama State Docks, (Terminal Railway), a switching railroad.

3. Houston H. Feaster (Feaster) is the Director of the Department, is a member of the cabinet of the Governor of the State of Alabama, was appointed by the Governor of the State of Alabama with the advice and consent of the Senate and holds office at the pleasure of the Governor.

4. The National Mediation Board (Board) is an agency of the United States created by Congress pursuant to the Railway Labor Act, 45 U.S.C. 151 et seq.

5. Warren S. Lane (Lane) is a Mediator employed by the Board.

6. C. A. Peacock (Peacock) is a Mediator employed by the Board.

7. Lane and Peacock are charged with the responsibility of carrying out the orders of the Board.

8. Vernol R. Jansen, Jr. (Jansen) is the duly acting United States Attorney for the Southern District of Alabama.

9. In 1919 the Congress of the United States declared that at least one public water "terminal should exist, constructed, owned, and regulated by . . .(a) public agency of the State and open to the use of all on equal terms" at ev-

ery city located at a harbor or navigable waterway throughout the United States. Rivers and Harbors Appropriation Act of 1919, 40 Stat. 1275, 1286 (1919). One of the primary purposes for development of rivers and harbors by the federal government has been to provide navigable waterways open to the use of all on equal terms for the purpose of reducing railroad rates. 57 Cong. Rec. 3543, 3549 (1919).

10. In furtherance of the National policy enunciated by Congress, the State authorized, constructed and has since 1928 operated and maintained publicly owned port facilities at Mobile. The State created and operates the Terminal Railway to insure that everyone would have equal access to the publicly owned maritime facilities at Mobile.

11. The general cargo piers and warehouses, bulk material handling plant, grain elevator, cotton compress and cold storage plant handle substantial quantities of goods and commodities which have not been shipped or received by rail; all of these facilities file tariffs with the Federal Maritime Board pursuant to the requirements of the Shipping Act of 1916, as amended, 46 U.S.C. 801 et seq.; none file tariffs or reports with the Interstate Commerce Commission; the employees of these facilities are civil service employees of the State and are covered by the State's "Merit System". Title 55 Code of Alabama 1940, Chapter 9. Employees of the maritime facilities are now and have been subject to the Social Security Act, Section 301 et seq. of Title 42 of the United States Code, and the State of Alabama has been and is now paying Social Security taxes to the United States pursuant to the Federal Insurance Contributions Act, Sections 3121 et seq. of Title 26 of the United States Code.

12. The Terminal Railway is a separate, distinct and identifiable facility of the State. In addition to serving the maritime facilities of the State, the Terminal Railway serves private industries located on or adjacent to property owned by the State in the vicinity of the maritime facilities. The Terminal Railway operates under a certificate of convenience and necessity issued by the Interstate Commerce Commission; the books and records of the Terminal Railway are kept in conformity with the uniform system of accounts established by the Interstate Commerce Commission. The Terminal Railway files an annual report of all of its activities with the Interstate Commerce Commission on a form provided by the Interstate Commerce Commission. Since 1950 all of the employees of the Terminal Railway have been and are now represented by "labor organizations, national in scope", authorized to represent employees of railroads pursuant to the Railway Labor Act, Section 151 et seq. of Title 45 of the United States Code. Since 1950 collective bargaining agreements between the Terminal Railway and labor organizations, national in scope, have been and are now in existence covering all employees of the Terminal Railway. Only employees of the Terminal Railway are covered by these collective bargaining agreements. The Terminal Railways pays taxes to the United States on each of its employees and officials pursuant to the Railroad Retirement Tax Act, Section 3201 et seq. of Title 26 of the United States Code and the Railroad Unemployment Insurance Act, Section 351 et seq. of Title 45 of the United States Code. Employees of the Terminal Railway are covered by the Railroad Retirement Act of 1935, Section 228a et seq. of Title 45 of the United States Code, and the Railroad Unemployment Insurance Act, Section 351 et seq. of Title

45 of the United States Code. The Terminal Railway performs switching services only. Switching services performed by the Terminal Railway consist of moving railroad cars from one point to another on interchange tracks maintained jointly by the Terminal Railway and line haul carriers, tracks of the Terminal Railway and private tracks. All of the compensation of the Terminal Railway is derived from switching and demurrage; the Terminal Railway does not receive any compensation as an originating carrier or as a line haul carrier. All Terminal Railway tariffs are on file with the Interstate Commerce Commission. The Terminal Railway is admittedly a "carrier" within the meaning of the acts of Congress regulating the "railroad world".

13. None of the maritime facilities of the Department perform any service for the Terminal Railway in connection with the transportation of property by railroad or in connection with the receipt, delivery, elevation, transfer in transit, refrigeration, icing, storage or handling of property transported by railroad. The Terminal Railway makes no distinction between various maritime facilities of the Department and private industries. The maritime facilities of the Department are charged exactly the same amount for an extra switch as is charged to a private industry served by the Terminal Railway. No distinction is made between a maritime facility of the Department and a private industry with respect to services rendered by the Terminal Railway; all are treated equally. Demurrage and other charges are assessed against and collected from the maritime facilities of the Department under the same rules as demurrage is assessed against private industries.

14. On July 27, 1959, the International Brotherhood of Firemen and Oilers, Helpers, Roundhouse and Railway Shop Laborers (Firemen and Oilers) filed an application with the Board requesting the Board to investigate a representation dispute involving "all persons employed by the Alabama State Docks Department at its facilities in Mobile, Alabama, except officers of the Docks Department, office clerical employees, such employees who are members of the craft or class covered by existing collective bargaining agreements between the Alabama State Docks Department and the Brotherhood, or other crafts or classes of employees now represented pursuant to the provisions of the Railway Labor Act". (All of the employees of the Terminal Railway were then and are now represented by "labor organizations, national in scope", authorized to represent employees of railroads pursuant to the Railway Labor Act, Section 151 et seq. of Title 45 United States Code.) The application of the Firemen and Oilers applies to, and only to, employees of the State of Alabama who work on and about the maritime facilities of the Department.

15. On October 21, 1959, without holding any hearing, the Board determined that the Department was a "carrier" in connection with the operation of the maritime facilities and found that the Board "has jurisdiction under the Railway Labor Act over the employees of the Alabama State Docks Department" referred to in the application of the Firemen and Oilers and docketed the application as National Mediation Board Case R-3390 (NMB Case R-3390).

16. In prior proceedings in this cause, *United States v. Feaster*, 5 Cir., 1967, 376 F.2d 147, 149, cert. deni. . . . .

U.S. . . . ., 19 L. Ed. 2d 265, the court held that the Board "has jurisdiction to make an investigation" in NMB Case R-3390 to determine whether the State of Alabama and its employees employed at the maritime facilities of the State of Alabama operated by the Alabama State Docks Department in Mobile are respectively a "carrier" and "employee" as used in the Railway Labor Act.

Pursuant to the mandate of the Court of Appeals in the *Feaster* case, this Court enjoined and restrained Houston H. Feaster, individually and as Director, Alabama State Docks Department "from refusing or preventing the National Mediation Board from access to the books and records of the Alabama State Docks Department showing the names, addresses and job classifications of all persons employed by the Alabama State Docks Department. . ." .

17. On December 5, 1967, the Board assigned Mediator Lane to investigate NMB Case R-3390. Thereafter Feaster and the State furnished Mediator Lane all necessary information concerning the employees of the maritime facilities of the State involved in NMB Case R-3390.

18. On February 5, 1968, the International Longshoremen's Association, Local No. 1410 (ILA) filed a petition with the Board to intervene in NMB Case R-3390.

19. On March 8, 1968, without having held any hearing, the Board authorized a ballot box election in NMB Case R-3390 among "All Employees Of The Alabama State Docks Employed At Its Facilities in Mobile, Alabama, Except Clerical, Office Employees And Security Protec-

tion Employees And Employees Covered By Existing Collective Bargaining Agreements Employed By Alabama State Docks at Mobile, Alabama" to determine if the employees of the State employed at the maritime facilities desired to be represented by the Firemen and Oilers, "International Longshoremen's Association" or "any other organization or individual". The election was scheduled for March 13 and 14, 1968.

20. On March 8, 1968, the Board through Peacock directed the State and Feaster to post a Notice of Election on each bulletin board maintained by the State at the Alabama State Docks at Mobile.

21. The State and Feaster declined to post the Notice of Election asserting that the State is not subject to the Railway Labor Act with respect to the maritime facilities owned and operated by the State at Mobile.

22. Failure to post a Notice of Election by a "carrier" subjects "the carrier, officer or agent offending" to criminal penalties. 45 U.S.C.A. 152.

23. Prior to October 21, 1959, the Board, the Interstate Commerce Commission, the Department of Internal Revenue, the Social Security Administration, the Railroad Retirement Board and the National Labor Relations Board all recognized that the maritime facilities of the State operated by the Department did not fall within the definition of "carrier" or "employer" as used in the Railway Labor Act and companion acts regulating the "railroad world". Apparently, all of these agencies of the United States, except

the Board, have continued to recognize that the maritime facilities of the State operated by the Department in Mobile do not fall within the definition of "carrier" or "employer" as used in the Railway Labor Act or companion acts regulating the "railroad world".

24. The National Labor Relations Act is not applicable to "any state or political subdivision thereof . . . or any person subject to the Railway Labor Act", 29 U.S.C.A. 152(2). In *Mobile Steamship Association (International Longshoremen and Warehousemen's Union)*, 8 N.L.R.B. 1297, 9 N.L.R.B. 60, the National Labor Relations Board exercised its expertise and found that the National Labor Relations Act did not apply to the Department or to the employees of the maritime facilities of the State here involved because the Department was a political subdivision of the State.

25. On March 9, 1968, Feaster and the State, by leave of Court first being had and obtained, amended their answer and filed four counterclaims, all of which seek a determination by this Court that the State is not a "carrier" within the meaning of the Railway Labor Act and other acts of Congress regulating the "railroad world" in connection with the operation by the State of the maritime facilities in Mobile and praying, among other things, for an immediate temporary restraining order and a preliminary injunction enjoining Lane from conducting an election among the employees of the maritime facilities of the State and against Jansen from prosecuting Feaster and the State and its officers for claimed commissions of the crimes defined by the Railway Labor Act. On March 9,

1968, the Court granted a temporary restraining order as prayed against Lane.

26. On March 19, 1968, the United States, Jansen and Lane filed their motion to dismiss the counterclaims.

27. The direction of election by the Board purports to fix the status of the maritime facilities of the State as those of a "carrier", purports to give the employees of the State employed at the maritime facilities operated by the Department the status of employees under the Railway Labor Act, and purports to nullify the Solomon Act (Title 55 Code of Alabama 1940, Sections 317(1)(4)), and, if validly made, deprives the employees named in the Notice of Election of the benefits flowing from the Merit System of the State (Title 55 Code of Alabama 1940, Chapter 9), as well as the Social Security Act (Sections 301 et seq. of Title 42 of the United States Code).

28. The direction of election by the Board among the employees of the State employed at the maritime facilities operated by the Department, if made in excess of the statutory power of the Board, deprives the State of its congressional created right in the National Labor Relations Act to formulate its personnel policies for non-railroad employees without interference from the federal government.

29. The conducting of an election by the Board would disrupt the entire existing uniform scheme of federal regulation of the maritime facilities of the State, and would unsettle the delicate balance of federal-state relations in an area intimately involved with sovereign prerogative.

30. It does not appear that the United States Attorney for the Southern District of Alabama is contemplating prosecuting Feaster or the Department for alleged violations of the criminal provisions of the Railway Labor Act.

Conclusions of Law.

31. This Court has jurisdiction to hear and determine the issues raised by the counterclaims.

32. Unless the preliminary injunction prayed for against Lane is granted, the State will suffer immediate and irreparable injury including denial of statutory rights and serious disturbance of the relations of the State with its employees employed at the maritime facilities of the State in Mobile, all to the economic disadvantage to the State. The granting of a preliminary injunction against Lane will cause less damage to Lane and to those persons in active concert and participation with him than the denial thereof will damage the State.

33. The State has no adequate remedy at law.

34. The motion of the United States, Lane and Jansen to dismiss the counterclaims is DENIED.

35. The motion of the State and Feaster for a preliminary injunction as prayed for in the third counterclaim is GRANTED.

36. The motion of the State and Feaster for a preliminary injunction against Jansen as prayed for in the fourth counterclaim is DENIED.

37. A preliminary injunction restraining and enjoining Lane as prayed for in the third counterclaim shall issue restraining Lane and all persons in active concert and participation with him until the final disposition of this cause by the Court.

DONE at Mobile, Alabama, this 8th day of April, 1968.

DANIEL H. THOMAS,
Chief Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION No. 2685.

UNITED STATES OF AMERICA,
Plaintiff,

versus

HOUSTON H. FEASTER, individually and as Director, Alabama State Docks Department, C. U. IRVINE, individually and as General Manager, Operations, Alabama State Docks Department, and the STATE of ALABAMA,

Defendants,

by original summons and between the said

HOUSTON H. FEASTER, individually and as Director, Alabama State Docks Department, and the STATE OF ALABAMA,

Plaintiffs,

versus

UNITED STATES OF AMERICA, WARREN S. LANE, individually and as Mediator, National Mediation Board, and VERNOL R. JANSEN, JR., individually and as United States Attorney for the Southern District of Alabama,

Defendants,

by counterclaim.

ORDER GRANTING PRELIMINARY INJUNCTION AND DENYING MOTION TO DISMISS COUNTERCLAIMS.

This cause came on to be heard on March 29, 1968, on the motion for a preliminary injunction filed by Houston H. Feaster, individually and as Director, Alabama State Docks Department, and the State of Alabama, and the motion of the United States of America, Warren S. Lane, individually and as Mediator, National Mediation Board, and Vernol R. Jansen, Jr., individually and as United States Attorney for the Southern District of Alabama, to dismiss the supplemental answer containing counterclaims filed by Houston H. Feaster, individually and as Director, Alabama State Docks Department, and the State of Alabama. The Court has fully considered the pleadings, affidavits, briefs

and arguments of counsel, and after due deliberation having made and entered its Findings of Fact and Conclusions of Law herein,

Now, therefore, upon the entire record, it is

ORDERED, ADJUDGED and DECREED that pending the final disposition of this cause, Warren S. Lane, individually and as Mediator, National Mediation Board, and all persons in active concert or participation with him be, and they hereby are, PROHIBITED from conducting an election among the employees of the State of Alabama employed at the port facilities consisting of general cargo piers and warehouses, bulk material handling plant, grain elevator, cotton compress and warehouse and cold storage plant owned and operated by the State of Alabama at Mobile.

It is further ORDERED, ADJUDGED and DECREED that security in the amount of FIVE THOUSAND AND NO/100ths ($5,000.00) DOLLARS filed with the Court on March 11, 1968, shall be continued in effect until further order of this Court, conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

It is further ORDERED, ADJUDGED and DECREED that the motion of the United States of America, Warren S. Lane, individually and as Mediator, National Mediation Board, and Vernol R. Jansen, Jr., individually and as United States Attorney for the Southern District of Alabama, to dismiss the counterclaims be, and the same hereby is, DENIED.

It is further ORDERED, ADJUDGED and DECREED that the motion of Houston H. Feaster, individually and as Director, Alabama State Docks Department, and the State of Alabama for a preliminary injunction against Vernol R. Jansen, Jr., individually and as United States Attorney for the Southern District of Alabama, as prayed for in the fourth counterclaim be, and the same hereby is, DENIED.

DONE at Mobile, Alabama, this 9th day of April, 1968. 12 o'clock midday.

DANIEL H. THOMAS,
Chief Judge.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 26019

UNITED STATES OF AMERICA and WARREN S. LANE, as Mediator, National Mediation Board, Appellants,

versus

HOUSTON H. FEASTER, individually and as Director Alabama State Docks Department, and the STATE OF ALABAMA, Appellees.

Appeal from the United States District Court for the Southern District of Alabama.

(May 5, 1969)

Before GOLDBERG and AINSWORTH, Circuit Judges, and SPEARS, District Judge.

GOLDBERG, Circuit Judge: We seek once again to resolve a ten year old controversy thrice here.[1] The con-

[1] Our earlier decisions are reported as follows: *United States v. Feaster*, 5 Cir. 1964, 330 F.2d 671; *United States v. Feaster*, 5 Cir. 1967, 376 F.2d 147, *cert. denied*, 389 U.S. 920, 88 S.Ct. 237, 19 L.Ed. 2d 265.

troversy on the merits is whether the National Mediation Board has the statutory authority to resolve a representation dispute among certain employees of the Alabama State Docks Department at Mobile, Alabama. There is, however, a preliminary issue which we find to be dispositive of this appeal: whether the district court had jurisdiction to enjoin the National Mediation Board from holding an election to resolve this representation dispute. We hold that the district court was without jurisdiction to enter the injunction and we reverse.

I.

In July, 1959, the International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers filed an application with the National Mediation Board for an investigation of a representation dispute concerning certain Alabama State Docks Department employees.[2] The Docks Department, an agency of the State of

[2] The application was filed pursuant to Section 2, Ninth, of the Railway Labor Act, 45 U.S.C.A. § 152, Ninth, which provides as follows:

"Disputes as to identity of representatives; designation by Mediation Board; secret elections

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the

Alabama,[3] owns and operates port facilities at Mobile. Included in this operation are general cargo piers, warehouses, a grain elevator, a cold storage plant, a plant for the storage and loading of edible fats and oils, a special unloading facility for bulk ores, and a terminal railroad. The prospective constituents of the petitioning Brotherhood are all of the employees of the Docks Department except those working for the terminal railroad, which employees are already represented by unions certified under the Railway Labor Act, and the office of clerical work.

As a jurisdictional prerequisite to its assumption of jurisdiction of this representation dispute, the National Mediation Board determined that the entire Docks Department was a "carrier" within the scope of 45 U.S.C.A. § 151, First (1954). That section provides as follows:

---

purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

[3] Appellee Feaster is a director of the Docks Department and as such he is vested with all the power and authority of the department. Appellee Irvine is the department's general manager of operations.

"First. The term 'carrier' includes *any* express company, sleeping-car company, *carrier by railroad*, subject to the Interstate Commerce Act, *and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service* (other than trucking service) *in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad*, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier': Provided, however, That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term 'carrier' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment, or facilities therefor, or in any of such activities." [Emphasis added.]

In making this determination, the Mediation Board noted that the terminal railroad was concededly a "carrier" and that both the terminal railroad and the public maritime facilities were subunits of the Docks Department. Since 45 U.S.C.A. § 151, First, by its terms covers companies "under common control with any carrier by railroad," the Board concluded that the Docks Department was a "carrier" under the Act.

The Docks Department has from the beginning of this epic controversy contended that the Mediation Board erred in finding that it had jurisdiction because the Department was a "carrier." When the Board first requested the Department's books and records in order to determine which employees were eligible to vote for union representation, the Department refused the request on the ground that the Board was acting without statutory authority. After considerable skirmishing in the district court and two appeals to this court, we held that the Board had made a sufficient showing that the Department was a "carrier" to warrant an order giving the Board access to the records.[4] *United States v. Feaster*, 5 Cir. 1967, 376 F.2d 147, *cert. denied*, 389 U.S. 920, 88 S.Ct. 237, 19 L.Ed.2d 265.

After finally obtaining the books and records, the Board determined which employees should participate in the representation election and scheduled the election for March 8, 1968. The state and its Docks Department officials declined to post notices of the election and secured from the court below an injunction prohibiting the holding of the

[4] When the Docks Department initially refused to comply with the request for access to its books and records, the government in September, 1961, brought an action to restrain the Docks Department officials from continuing to refuse to allow inspection. The district court dismissed the government's complaint for failure to state a claim. This court reversed. *United States v. Feaster*, 5 Cir. 1964, 330 F.2d 671. The government then moved for a summary judgment and preliminary injunction prohibiting further lack of compliance. The district court denied these motions. The case at that time was of eight year vintage and we again reversed, holding that the Board was entitled to access to the requested records and an order of the district court granting same. *United States v. Feaster*, 5 Cir. 1967, 376 F.2d 147, *cert. denied*, 389 U.S. 920, 88 S.Ct. 237, 19 L.Ed.2d 265.

election on the ground that the Docks Department was not subject to the Railway Labor Act. Thus, after a decade we find the statutory command to attain a prompt and orderly

---

[5] In enjoining the election, the district court made the following findings of fact:

"11. The general cargo piers and warehouses, bulk material handling plant, grain elevator, cotton compress and cold storage plant handle substantial quantities of goods and commodities which have not been shipped or received by rail; all of these facilities file tariffs with the Federal Maritime Board pursuant to the requirements of the Shipping Act of 1916, as amended, 46 U.S.C. 801 et seq.; none file tariffs or reports with the Interstate Commerce Commission; the employees of these facilities are civil service employees of the State and are covered by the State's 'Merit System.' Title 55 Code of Alabama 1940, Chapter 9. Employees of the maritime facilities are now and have been subject to the Social Security Act, Section 301 et seq. of Title 42 of the United States Code, and the State of Alabama has been and is now paying Social Security taxes to the United States pursuant to the Federal Insurance Contributions Act, Sections 3121 et seq. of Title 26 of the United States Code.

"12. The Terminal Railway is a separate, distinct and identifiable facility of the State. In addition to serving the maritime facilities of the State, the Terminal Railway serves private industries located on or adjacent to property owned by the State in the vicinity of the maritime facilities. The Terminal Railway operates under a certificate of convenience and necessity issued by the Interstate Commerce Commission; the books and records of the Terminal Railway are kept in conformity with the uniform system of accounts established by the Interstate Commerce Commission. The Terminal Railway files an annual report of all of its activities with the Interstate Commerce Commission on a form provided by the Interstate Commerce Commission. Since 1950 all of the employees of the Terminal Railway have been and are now represented by 'labor organizations, national in scope,' authorized to represent employees of railroads pursuant to the Railway Labor Act, Section 151 et seq. of Title 45 of the United States Code. Since 1950 collective bargaining agreements between the Terminal Railway and labor organizations, national in scope, have been and are now in existence covering all employees of the Terminal Railway. Only employees of the Terminal Railway are covered by these collective bargaining agreements. The

Terminal Railway pays taxes to the United States on each of its employees and officials pursuant to the Railroad Retirement Tax Act, Section 3201 et seq. of Title 26 of the United States Code and the Railroad Unemployment Insurance Act, Section 351 et seq. of Title 45 of the United States Code. Employees of the Terminal Railway are covered by the Railroad Retirement Act of 1935, Section 228a et seq. of Title 45 of the United States Code, and the Railroad Unemployment Insurance Act, Section 351 et seq. of Title 45 of the United States Code. The Terminal Railway performs switching services only. Switching services performed by the Terminal Railway consist of moving railroad cars from one point to another on interchange tracks maintained jointly by the Terminal Railway and line haul carriers, tracks of the Terminal Railway and private tracks. All of the compensation of the Terminal Railway is derived from switching and demurrage; the Terminal Railway does not receive any compensation as an originating carrier or as a line haul carrier. All Terminal Railway tariffs are on file with the Interstate Commerce Commission. The Terminal Railway is admittedly a 'carrier' within the meaning of the acts of Congress regulating the 'railroad world.'

"13. None of the maritime facilities of the Department perform any service for the Terminal Railway in connection with the transportation of property by railroad or in connection with the receipt, delivery, elevation, transfer in transit, refrigeration, icing, storage or handling of property transported by railroad. The Terminal Railway makes no distinction between various maritime facilities of the Department and private industries. The maritime facilities of the Department are charged exactly the same amount for an extra switch as is charged to a private industry served by the Terminal Railway. No distinction is made between a maritime facility of the Department and a private industry with respect to services rendered by the Terminal Railway; all are treated equally. Demurrage and other charges are assessed against and collected from the maritime facilities of the Department under the same rules as demurrage is assessed against private industries. . .

* * *

"15. On October 21, 1959, without holding any hearing, the Board determined that the Department was a 'carrier' in connection with the operation of the maritime facilities and found that the Board 'has jurisdiction under the Railway Labor Act over the employees of the Alabama State Docks Department' . . . .

* * *

"24. The National Labor Relations Act is not applicable to 'any state or political subdivision thereof . . . or any

settlement of labor disputes[6] made a mockery in cynical disregard of the Supreme Court's hopeful but here frustrated words that there is "to be no dragging out of the controversy into other tribunals of law." *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 305, 64

---

person subject to the Railway Labor Act,' 29 U.S.C.A. 152 (2). In *Mobile Steamship Association (International Longshoremen and Warehousemen's Union)*, 8 N.L.R.B. 1297, 9 N.L. R.B. 60, the National Labor Relations Board exercised its expertise and found that the National Labor Relations Act did not apply to the Department or to the employees of the maritime facilities of the State here involved because the Department was a political subdivision of the State.

"25. On March 9, 1968, Feaster and the State, by leave of Court first being had and obtained, amended their answer and filed four counterclaims, all of which seek a determination by this Court that the State is not a 'carrier' within the meaning of the Railway Labor Act and other acts of Congress regulating the 'railroad world' in connection with the operation by the State of the maritime facilities in Mobile and praying, among other things, for an immediate temporary restraining order and a preliminary injunction enjoining Lane [mediator for National Mediation Board] from conducting an election among the employees of the maritime facilities of the State and against Jansen from prosecuting Feaster and the State and its officers for claimed commissions of the crimes defined by the Railway Labor Act. On March 9, 1968, the Court granted a temporary restraining order as prayed against Lane."

[6] In 45 U.S.C.A. § 151(a) (1954) we read:

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. . . ."

S.Ct. 95, 88 L.Ed. 61, 66. As we are witness these days to much vocalizing for participatory democracy, we can feel nothing but dismay at the length of the enforced employee-union disengagement here.

II.

The National Mediation Board argues that the court below did not have jurisdiction over this controversy and that we should reverse the judgment. The Mediation Board's argument has a dual predicate: (1) that proceedings of the National Mediation Board conducted pursuant to 45 U.S.C.A. § 152, Ninth, are never subject to judicial review; and (2) assuming that this controversy may be subject to judicial review, it is not ripe for review at this time because the administrative process has not culminated in a final order.

III.

In arguing that the representation proceedings at bar are not reviewable, the Mediation Board relies heavily on *Switchmen's Union v. N.L.R.B.*, 1943, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61. In *Switchmen's Union* the Supreme Court was asked to resolve a jurisdictional dispute between two unions seeking to represent certain railroad yardmen. The Court, however, refused to reach the merits of the case, holding that the matter was unreviewable. The Court explained its decision as follows:

> "We do not reach the merits of the controversy. For we are of the opinion that the District Court did not have the power to review the action of the National Mediation Board in issuing the certificate.

"Section 24(8) of the Judicial Code, 28 USCA § 41 (8), 8 FCA title 28, § 41(8) gives the federal district courts 'original jurisdiction' of all 'suits and proceedings arising under any law regulating commerce.' We may assume that if any judicial review of the certificate of the Board could be had, the District Court would have jurisdiction by reason of that provision of the Judicial Code. [cases cited] But we do not think that that broad grant of general jurisdiction may be invoked in face of the special circumstances which obtain here.

"If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks, 281 US 548, 74 L ed 1034, 50 S Ct 427, and Virginian R. Co. v. System Federation, R.E.D. 300 US 515, 81 L ed 789, 57 S Ct 592. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the 'right' of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose. Such considerations are not applicable here. The Act in § 2, Fourth writes into law the 'right' of the 'majority of any craft or class of employees' to 'determine who shall be the representative of the craft or class for the purposes of this Act.' That 'right' is protected by § 2, Ninth which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held. [cases cited] A review by the

federal district courts of the Board's determination is not necessary to preserve or protect that 'right.' Congress for reasons of its own decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. . . .

* * *

"Generalizations as to when judicial review of administrative action may or may not be obtained are of course hazardous. When Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied.

* * *

"In that connection the history of § 2, Ninth is highly relevant. It was introduced into the Act of 1934 as a device to strengthen and make more effective the processes of collective bargaining. [cases cited] It was aimed not only at company unions which had long plagued labor relations [case cited] but also at numerous jurisdictional disputes between unions. Commissioner Eastman, draftsman of the 1934 amendments, explained the bill at the congressional hearings. He stated that whether one organization or another was the proper representative of a particular group of employees was 'one of the most controversial questions in connection with labor organization matters.' [citations] He stated that it was very important 'to provide a neutral tribunal which can make the decision and get the matter settled.' [citation] But the problem was deemed to be so 'highly controversial' that it was thought that the prestige of the Mediation Board might

be adversely affected by the rulings which it would have to make in these jurisdictional disputes. [citations] Accordingly § 2, Ninth was drafted so as to give to the Mediation Board the power to 'appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election.' That was added so that the Board's 'own usefulness of settling disputes that might arise thereafter might not be impaired.' [citations] Where Congress took such great pains to protect the Mediation Board in its handling of an explosive problem, we cannot help but believe that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain.

* * *

"In the present case the authority of the Mediation Board in election disputes to interpret the meaning of 'craft' as used in the statute is no less clear and no less essential to the performance of its duty. The statutory command that the decision of the Board shall be obeyed is no less explicit. Under this Act Congress did not give the Board discretion to take or withhold action, to grant or deny relief. It gave it no enforcement functions. It was to find the fact and then cease. Congress prescribed the command. Like the command in the Butte A. & P. R. Co. Case it contained no exception. Here as in that case the intent seems plain —the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.

* * *

> "What is open when a court of equity is asked for its affirmative help by granting a decree for the enforcement of a certificate of the Mediation Board under § 2, Ninth raises questions not now before us. [cases cited] Reversed." 88 L.Ed 63-67.

Compañionate to *Switchmen's Union* and in full accord with its thesis are *General Committee v. Missouri-K.-T. R. Co.*, 1943, 320 U.S. 323, 64 S. Ct. 146, 88 L.Ed. 76, and *General Committee v. Southern Pacific Co.*, 320 U.S. 338, 64 S. Ct. 142, 88 L. Ed. 85. See also *Brotherhood of Locomotive Firemen and Engineers v. Louisville & N. R. Co.*, 6 Cir. 1968, 400 F.2d 572, *cert. denied*, ... U.S. ...., 89 S.Ct. 689; *Brotherhood of Ry. & Steamship Clerks v. United Air Lines*, 6 Cir. 1963, 325 F.2d 576, cert. dismissed as improvidently granted, 379 U.S. 26, 85 S.Ct. 183, 13 L.Ed.2d 173; *Radio Officers Union v. National Mediation Board*, D. C. Cir. 1950, 181 F.2d 801; *United Transport Serv. v. National Mediation Board*, D. C. Cir. 1949, F.2d 446; *Kirkland v. Atlantic Coast Line*, D. C. Cir. 1948, 167 F.2d 529; *Order of Railway Conductors v. National Mediation Board*, D.C. Cir. 1944, 141 F.2d 366; but *cf. Brotherhood of Locomotive Firemen v. Kenan*, 5 Cir. 1937, 87 F.2d 651; *Brotherhood of Trainmen v. National Mediation Board*, D. C. Cir. 1936, 88 F.2d 757.

On its face *Switchmen's Union* appears to preclude all review of National Mediation Board decision in representation proceedings. The sweeping language of *Switchmen's Union* and its progeny, however, has been explained and narrowed somewhat in the more than two decades since the

opinion was written. *cf.*, e.g., *Order of Railway Conductors v. Swan*, 1947, 329 U.S. 520, 67 S. Ct. 405, 91 L.Ed. 471, *Brotherhood of R. T. v. Howard*, 1952, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283. During this period courts have limited *Switchmen's Union* by considering the factual context of the opinion (craft jurisdiction dispute), the effect of the subsequent adoption of the Administrative Procedure Act in 1946,[7] and the possibility of review by a court of equity when the National Mediation Board asks the court for affirmative help in enforcing its certificate.

(A)

It is arguable that *Switchmen's Union* can be distinguished from the case at bar. There the Supreme Court was faced with a jurisdiction dispute between two rival unions seeking to represent the same railroad yardmen, and the issue decided was whether the Board's use of its discretion to resolve the dispute was reviewable. "The question was not as to the power of the Board to resolve the dispute but whether it had done so in an erroneous manner." *Air Line Dispatchers Ass'n v. National Mediation Board*, D.C. Cir. 1951, 189 F.2d 685, 688, *cert. denied*, 342 U.S. 849, 72 S.Ct. 77, 96 L.Ed. 641. Furthermore, the Supreme Court emphasized that "Generalizations as to when judicial review of administrative action may or may not be obtained are of course hazardous. Where Congress has not expressly authorized judicial review [as in the case *sub judice*], the type of problem involved" as well as the "history of the statute in question" becomes highly relevant. 320

[7] 5 U.S.C.A. §§ 551, 701-706 (1967).

U.S. at 301, 64 S.Ct. at 97, 88 L.Ed. at 64. Thus it might be said that while *Switchmen's Union* holds that there is no judicial review where the Board has exercised its informed discretion in resolving inter-union representation disputes, it does not preclude judicial review of questions of law which bear directly upon the jurisdiction of the Mediation Board.[8] *Air Line Dispatchers Ass'n v.*

[8] We find precedent for this distinction in the "corpus of 'national labor policy' [which has] developed during the more than 30 years of administering our most comprehensive national labor scheme, the Labor Management Relations Act," which the Supreme Court has in the past referred to for assistance in construing the Railway Labor Act. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 1969 37 U.S.L.W. 4247, 4251. In areas where the National Labor Relations Board has considerable discretion, judicial review is very circumscribed. For example, the Board has great discretion in the determination of appropriate bargaining units, which determinations may involve the resolution of inter-union and/or craft jurisdictional disputes (as in *Switchmen's Union*), and in these matters "the decision of the Board, if not final, is rarely to be disturbed." *Packard Motor Co. v. N.L.R.B.*, 1947, 330 U.S. 485, 491, 67 S.Ct. 789, 91 L.Ed. 1040, 1050. See also *N.L.R.B. v. Tallahassee Coca-Cola Bottling Co.*, 5 Cir. 1969, ... F.2d .... [No. 26,322 April 2, 1969]; *N.L.R.B. v. Local 991, International Longshoremen's Ass'n.*, 5 Cir. 1964, 332 F.2d 66, 70; *Retail, Wholesale, & Department Store Union v. N.L.R.B.*, D.C. Cir. 1967, 385 F.2d 301, 305. Where, however, the Board has ruled on a question of law which affects its jurisdiction (as in the case *sub judice*), the courts have a broader scope of review and may even substitute their judgment for that of the Board. For example, in *Office Employees v. N.L.R.B.*, 1957, 353 U.S. 313, 77 S. Ct. 799, 1 L.Ed.2d 846, the Supreme Court held that the Board had misinterpreted the Act when it held that a labor organization which has employees should not be treated as an "employer" under § 2(2) of the Act. In holding that the organization was an employer, the Court gave the Board jurisdiction over the labor dispute.

To summarize the foregoing, under the Labor Management Relations Act the scope of judicial review of representation disputes of the type involved in *Switchmen's Union* is very narrow. However, questions of statutory construction which relate to the extent of the Labor Board's jurisdictional power are subject to full judicial review. Viewing the language of *Switchmen's Union* in the light of this experience under the La-

National Mediation Board, supra; 189 F.2d at 688; *cf. Railway Clerks v. Non-Contract Employees*, 1965, 380 U.S. 650, 85 S.Ct. 1192, 14 L.Ed.2d 133; *Leedom v. Kyne*, 1958, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210; *International Brotherhood of Teamsters v. Brotherhood of Rail., A. & S. Cl.*, D.C. Cir. 1968, 402 F.2d 196, 205 at fn. 19, *cert. denied*, ... U.S. ...., 89 S.Ct. 135, ... L.Ed.2d ..... .

(B)

It is also possible that *Switchmen's Union* has been partially undermined by the Right of Review provisions in the Administrative Procedure Act. In *Air Line Dispatchers Ass'n v. National Mediation Board, supra*, wherein the D. C. Circuit was confronted with the "purely legal question of the territorial jurisdiction of the Board," the Court wrote that *Switchmen's Union* had been partially undermined by these review provisions:

> "The law was in this posture when the Administrative Procedure Act (5 U.S.C.A. §§ 1001-1011) was approved June 11, 1946. In § 10 it provides:
>
> 'Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

---

bor Management Relations Act, it is arguable that the Supreme Court intended to proscribe review of National Mediation Board decisions only in areas where the Board was merely exercising discretionary powers granted by the Act, and that it did not intend to eliminate judicial review of questions relating to the extent of these Mediation Board powers. *cf. Brotherhood of Ry. & S. S. Clerks v. National Mediation Board*, D. C. Cir. 1966, 374 F.2d 269.

'(a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.' (5 U.S.C.A. § 1009.)

"We pointed out in Kirkland v. Atlantic Coast Line R. Co., supra, that the limitations upon judicial review set forth in the Switchmen's and like cases must be considered as read into the Administrative Procedure Act; that is, review is not available under § 10 where a statute, as judicially interpreted, precludes it. . . ."

"Nevertheless the purpose of § 10 is to afford review unless the matter has been committed to agency discretion—a situation not now presented—or unless Congress has otherwise decided. When, as in the Switchmen's case, it had been held that Congress had manifested its intention to exclude review the new legislation was not to be construed as changing the situation. On the other hand, the general purport of the statute is that persons suffering legal wrong because of agency action, or adversely affected or aggrieved thereby, should be allowed by § 10 to obtain judicial consideration. [citation]. The statement in the Switchmen's opinion (320 U.S. at page 343, 64 S.Ct. at page 145, 88 L.Ed. 85), referred to above, that in view of the history of the Railway Labor Act a purpose to afford judicial remedy must plainly appear should now be read in the light of the purpose of the Administrative Procedure Act subsequently enacted: 'Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under this bill. The mere fact that Congress has not expressly provided for judicial review would be completely immaterial.' [citation].

"(C). The type of question now presented was, as we have said, in the area of those reserved under the Railway Labor Act. This being so, and because of the nature of the question, we are of the opinion that the Administrative Procedure Act indicates a Congressional purpose to authorize review of it by the courts. Since it is not a question of the type previously held unreviewable, and since there is no explicitness in the Railway Labor Act or indication in its history of a Congressional intention to leave it exclusively to Board determination, the provisions of § 10 of the Administrative Procedure Act for court review take hold of it." 189 F.2d at 685.

But *cf. American Air Export & Import Co. v. O'Neill*, D.C. Cir. 1954, 221 F.2d 829.

C.

Switchmen's Union itself suggests a third route around its own seemingly impenetrable barrier against judicial review. *cf. United States v. Feaster, supra*, 376 F.2d at 150, fn. 4. The Supreme Court wrote:

"What is open when a court of equity is asked for its affirmative help by granting a decree for the enforcement of a certificate of the Mediation Board under § 2, Ninth raises questions not now before us. See Virginian R. Co. v. System Federation R. E. D. supra (300 US pp. 559-562, 81 L ed 805-807, 57 S Ct 592)." 320 U.S. at 307, 88 L.Ed. at 67.

Judge Holtzoff in *Aeronautical Radio, Inc. v. National Mediation Board*, D.D.C. 1966, 255 F.Supp. 466, 467, focused upon this crack in the door to judicial review left by *Switchmen's Union*. He considered "matters that appeal to

the conscience of a Court of equity" and reached the conclusion "that the strong arm of equity should not be exerted in order to compel the employer to bargain collectively with the union having a plurality of votes when by far the greater number of employees voted for no union at all." The Court of Appeals for the D. C. Circuit, without detailing the "powers of an equity court when faced with a suit for a mandatory injunction to compel compliance with section 2, Ninth, of the Act," reversed the judgment of the district court. 380 F.2d 624, 627, *cert. denied*, 389 U.S. 912, ... S.Ct. ..., ... L.Ed.2d ....

From this brief sojourn into the land of equity we know that courts have only a very, very limited equitable power to refuse enforcement of Mediation Board certifications. Limited as its role may be, equity may still ultimately play a part in the final disposition of this case. *cf. Shields v. Utah Idaho C. R. Co.*, 1938, 305 U.S. 177, 183, 59 S.Ct. 16, 83 L.Ed. 111, 116. However, for reasons set forth *infra*, we do not now decide whether the district court will be forever foreclosed from dispensing equity in this controversy. We do hold that here the district court was premature in such dispensation.

IV.

The foregoing authorities indicate that it is possible, but far from certain, that the National Mediation Board's determination that the Docks Department is a "carrier" may *eventually* be a proper subject for judicial review. However, even if we assume for the sake of argument that the Mediation Board's action is reviewable, we cannot reach

the merits of the controversy because the case is not yet ripe for judicial involvement.

The Mediation Board has investigated the dispute, has found that it has jurisdiction, and has ordered an election. The administrative process, nonetheless, remains incomplete because the election has not been held and the Mediation Board's certificate, which "is the ultimate finding of fact prerequisite to enforcement by the courts," has not been issued. *Virginian R. Co. v. System Federation, R.E.D.*, 1937, 300 U.S. 515, 562, 57 S.Ct. 592, 81 L.Ed. 789, 807. Accord, *Eastern Greyhound Lines v. Fusco*, 6 Cir. 1963, 323 F.2d 477, 479.

Except for three special and narrow exceptions to be discussed *infra*, judicial review of administrative determinations is generally limited to final orders or actions. This general rule is particularly appropriate to the resolution of labor representation disputes since the Act places a great premium on speed and seeks to limit the opportunity "for dilatory tactics which would postpone the commencement of bargaining when the employer [has] no substantial objection to the conduct of the election other than a desire to delay bargaining as long as possible." *Boire v. Miami Herald Publishing Co.*, 5 Cir. 1965, 343 F.2d 17, 20, *cert. denied*, 382 U.S. 824, 86 S.Ct. 56, 15 L.Ed.2d 70. In accord with this statutory policy, the Supreme Court has held that an employer's attempt to litigate a question of statutory construction prior to final Labor Board action "is at war with the long settled rule of judicial administration that no one is entitled to judicial review for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly cited on in cases

where, as here, the contention is made that the administrative body lacked power over the subject matter." *Myers v. Bethlehem Shipbldg. Corp.*, 1937, 303 U.S. 41, 50-51, 58 S.Ct. 459, 82 L.Ed. 638, 644. See also *Marine Engineers Beneficial Ass'n v. Interlake S. S. Co.*, 1962, 370 U.S. 173, 82 S.Ct. 1237, 8 L.Ed.2d 418; *Bokat v. Tidewater Equipment Company*, 5 Cir. 1966, 363 F.2d 667; *Howard v. St. Louis-San Francisco Ry. Co.*, 8 Cir. 1966, 361 F.2d 905, *cert. denied*, 385 U.S. 905; *Chicago Automobile Trade Ass'n v. Madden*, 7 Cir. 1964, 328 F.2d 766, *cert. denied*, 377 U.S. 979, 84 S.Ct. 1885, 12 L.Ed.2d 747; *Atlanta Metallic Casket Co. v. United Paperworkers*, N.D. Ga. 1949, 87 F.Supp. 718; *cf. N.L.R.B. v. Local 254, Building Service Employees Int. Union*, 1 Cir. 1967, 376 F.2d 131, 135, *cert. denied*, 389 U.S. 856.

In view of these strong policies and authorities making the administrative assertion of jurisdiction unassailable prior to the exhaustion of agency decisional options, we hold that this controversy has not yet ripened for judicial interavention.[9] See *Local 130, Elec., R. & M. Wkrs. v. McCulloch*, D.C. Cir. 1965, 345 F.2d 90. This case does not fall within any of the exceptions to the general rule of jurisdictional claustration:

> "One exceptional set of circumstances is presented where the suit tenders 'public questions particularly

[9] The armor forged by Congress so as to minimize judicial intrusions into findings and conclusions of the Board in labor matters has great tensile strength in insulating the Mediation Board as well as the National Labor Relations Board. *cf. Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 1969, 37 U.S.L.W. 4247, 4251; *International Brotherhood of Teamsters v. Brotherhood of Rail., A.&S. Cl.*, D.C. Cir. 1968, 402 F.2d 196, 205 at fn. 19, *cert. denied*, ... U.S. ...., 89 S.Ct. 135, ... L.Ed.2d .....

high in the scale of our national interest because of their international complexion." McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 17, 83 S.Ct. 671, 675, 9 L.Ed.2d 547, 552 (1963). Another exception, which has been fashioned primarily by the Second Circuit, comes into play where there is a substantial showing that Board action has violated the constitutional rights of the complaining party. See Fay v. Douds (2 Cir. 1949) 172 F.2d 720. The third exception, on which the appellee relies strongly, is predicated on the Supreme Court's decision in Leedom v. Kyne, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958). There the court upheld a district court injunction setting aside a Board election and certification where the Board had clearly acted 'in excess of its delegated powers and contrary to a specific prohibition in the Act.' 79 S.Ct. at 184, 3 L.Ed.2d at 214. The courts have generally interpreted Kyne as sanctioning the use of injunctive powers only in a very narrow situation in which there is a 'plain' violation of an unambiguous and mandatory provision of the statute. [cases cited]." *Boire v. Miami Herald Publishing Co., supra*, 343 F.2d at 21.

(A)

The first exception is found in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 1963, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547, wherein the Supreme Court permitted review of an NLRB election order because of the international overtones involved in the Board's application of the National Labor Relations Act to foreign maritime crews:

"While here the Board has violated no specific prohibition in the Act, the overriding con-

sideration is that the Board's assertion of power to determine the representation of foreign seamen aboard vessels under foreign flags has aroused vigorous protests from foreign governments and created international problems for our Government. Important interests of the immediate parties are of course at stake. But the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power. No question of remotely comparable urgency was involved in Kyne [infra], which was a purely domestic adversary situation. The exception recognized today is therefore not to be taken as an enlargement of the exception in Kyne."

In the case at bar we find none of the international urgency present in *Sociedad Nacional*,[10] and we therefore conclude that *Sociedad Nacional* does not provide a passport through the obstacles to pregestational judicial interference. Accord, *Boire v. Greyhound Corp.*, 1964, 376 U.S. 473, 480-81, 84 S.Ct. 894, 11 L.Ed.2d 849, 854-55.

---

[10] In *Sociedad Nacional* the NLRB determined that it had jurisdiction over a representation dispute on certain foreign-flag ships and ordered an election to determine who would represent the crews of the ships. The Second Circuit, reversing a district court order, held that this was one of the rare situations where review was available prior to a final Board order and also that the Act did not apply to the maritime operations in question. In affirming, the Supreme Court pointed out that the Board's order had the effect of canceling the collective bargaining agreement between the foreign-flag shipowner and a foreign union, and that such action would have such serious international repercussions that immediate judicial intervention was necessary.

(B)

A second exception to the rule of exhaustion was fashioned by the Second Circuit in *Fay v. Douds*, 2 Cir. 1949, 172 F.2d 720. This exception permits judicial interdiction of the administrative process "where there is a substantial showing that Board action has violated the constitutional rights of the complaining party." *Boire v. Miami Herald Publishing Co., supra*, 343 F.2d at 21; *cf. Local 1545, United Brotherhood of Carpenters v. Vincent*, 2 Cir. 1960, 286 F.2d 127, 130-31. Attempting to invoke this principle, the Docks Department alleges that the failure of the Board to hold a hearing before determining its carrier status was a denial of due process which had the effect of vesting the district court with jurisdiction.

We hold that this contention is "transparently frivolous" since this Court has already considered it and deemed it to be without merit. In *United States v. Feaster, supra*, 376 F.2d at 150, fn. 3, we read:

> "The State has, at all stages, objected to the Board's making a determination of carrier status without a hearing. The Board acts more in the capacity of a referee; there is no requirement of a hearing at any stage of the matter. The Board does not enter orders, and its only ultimate finding of fact is the certificate. [cases cited] '[T]he Board's duty to investigate is a duty to make such investigation

---

In the case *sub judice* the ultimate issue is only which, if any, domestic unions will represent certain domestic employees working on dock facilities owned and operated by the State of Alabama. Certainly this dispute does not have grave international implications such as were involved in *Sociedad Nacional*.

> as the nature of the case requires. An investigation is 'essentially informal, not adversary'; it is 'not required to take any particular form.' * * * Congress has simply told the Board to investigate and has left to it * * * the methods and procedures which it should employ in each case.' "

This language clearly means that the function of the Board is investigatory, not adjudicatory, and therefore that " 'the full panoply of judicial procedures [need not] be used.' " *WES Chapter, Flight Eng. Int. Ass'n v. National Mediation Board*, D.C. Cir. 1962, 314 F.2d 234, 238, quoting from *Hannah v. Larche*, 1959, 363 U.S. 420, 442, 80 S.Ct. 1502, 4 L.Ed.2d 1307. We therefore hold that due process does not require a hearing in this situation. See *Switchmen's Union v. National Mediation Board, supra*, 320 U.S. at 304, 64 S.Ct. at 98, 88 L.Ed. at 66-67.

Furthermore, we note that "there is some question whether our prior decisions have recognized [the *Fay v. Douds*] exception, at least where an employer invokes it." *Boire v. Miami Herald Publishing Company, supra*, 343 F.2d at 21, fn. 7. See *Volney Felt Mills v. Le Bus*, 5 Cir. 1952, 196 F.2d 497.

(C)

The third and most important exception to the exhaustion doctrine was developed by the Supreme Court in *Leedom v. Kyne*, 1958, 358 U.S. 184, 79 S.Ct. 180, 3

L.Ed.2d 210.[11] In that case the Supreme Court permitted review of the NLRB's certification of a bargaining unit which included both professional and nonprofessional employees even though the professional employees had not consented to inclusion in the otherwise nonprofessional unit. This action was a brazen defiance of the express provisions of 29 U.S.C.A. § 159(b)(1).[12] The District Court, whose judgment was affirmed by the Second Circuit, held that the Board had acted in excess of its powers and set aside the Board's determination even though it was not a "final order." "On the Board's appeal it did not contest the trial court's conclusion that the Board, in commingling professional with nonprofessional employees in the unit, had acted in excess of its powers and had thereby worked injury to the statutory rights of the professional employees. Instead, it contended only that the District Court lacked jurisdiction to entertain the suit." 358 U.S. at 187, 3 L.Ed.2d at 213. In this extreme factual context, the Supreme Court held that the District Court had original jurisdiction:

> "This suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the

[11] The importance of *Leedom v. Kyne* to the case before us lies not only in its significance as an exception to the general rule of exhaustion, but also in the fact that it is the only undisputed exception to *Switchmen's* doctrine that Mediation Board decisions in representation matters are unreviewable. "It is generally assumed that *Leedom* does apply to matters arising under the Railway Labor Act." *International Brotherhood of Teamsters v. Brotherhood of Rail., A. & S. Cl., supra,* 402 F.2d at 205, fn. 19.

[12] 29 U.S.C.A. § 159(b)(1) provides in relevant part: "[T]he Board shall not (1) decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit."

Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. . . . Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a 'right' assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.

* * *

"Here, differently from the Switchmen's case, 'absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which Congress' has given professional employees, for there is no other means, within their control [case cited] to protect and enforce that right. And 'the inference [is] strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control.' [citation] This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers. [cases cited].

"Where, as here, Congress has given a 'right' to the professional employees it must be held that it intended that right to be enforced, and "the courts . . . encounter no difficulty in fulfilling its purpose.' [case cited]

The Court of Appeals was right in holding, in the circumstances of this case, that the District Court had jurisdiction of this suit, and its judgment is Affirmed."

Leedom v. Kyne could easily have opened the doors of the federal courts to matters which Congress has declared are to be, initially at least, the arbitraments of the Mediation Board and the NLRB. History and the Supreme Court, however, have shown the contrary to be the case:

> "It is sometimes said that in Leedom v Kyne, 358 US 184, 3 L ed 2d 210, 79 S Ct 180 (1958), the Court created an 'exception' to the doctrine of Switchmen's Union. In Kyne, it was held that the law afforded a remedy in the courts when unlawful action by the National Labor Relations Board inflicted injury on one of the parties to a bargaining dispute. But this was no exception to Switchmen's Union. Rather the Court was careful to note that '[t]his suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a *specific prohibition in the Act.*' Leedom v. Kyne, 358 US 184, 188, 3 L ed 2d 210, 214, 79 S Ct 180. (Emphasis supplied.) The limited nature of this holding was re-emphasized only last Term where we referred to the 'narrow limits' and 'painstakingly delineated procedural boundaries of Kyne.' Boire v Greyhound Corp. 376 US 473, 481, 11 L ed 2d 849, 855, 84 S Ct 894 (1964). It is with these principles in mind that we turn to the questions in the instant cases." *Railway Clerks v. Non-Contract Employees,* 1965, 380 U.S. 650, 659, 85 S.Ct. 1192, 14 L.Ed.2d 133, 140.

Today, therefore, *Leedom v. Kyne* represents only a narrow and rarely successfully invoked exception to the doctrine that exhaustion of administrative procedures is a condition precedent to federal court jurisdiction. Under this exception access to the courts is accorded only if the Mediation Board's determination is infused with error which is of a *summa* or *magna* quality as contraposed to decisions which are simply *cum* error. Only the egregious error melds the Board's decision into justiciability. Lesser malignancies thwart the jurisdiction of the courts. *Modern Plastics Corporation v. McCulloch*, 6 Cir. 1968, 400 F.2d 14, 17; *Local 690, Teamsters v. N.L.R.B.*, 9 Cir. 1967, 375 F.2d 966; *UNA Chapter, Flight Engineer's Ass'n v. N.L.R.B.*, D. C. Cir. 1961, 294 F.2d 905, *cert. denied*, 368 U.S. 956, 82 S.Ct. 394, 7 L.Ed.2d 388; *Int. Ass'n of Tool Craftsmen v. Leedom*, D.C. Cir. 1960, 276 F.2d 514, *cert. denied*, 364 U.S. 815, 5 L.Ed.2d 46, 81 S.Ct. 45; accord, *Potter v. Castle Construction Co.*, 5 Cir. 1966, 355 F.2d 212, 217. With these strictures in mind, we turn to the merits of this case to determine whether there was such an obvious or gross misapplication of statutory dictates that jurisdiction was vested in the district court, or whether the district court erred in not dismissing for lack of jurisdiction.[13]

[13] *Leedom v. Kyne* is also narrowly construed where the issue is whether and how the Mediation Board should conduct an election in a representation dispute over which the Board has jurisdiction. In *International Brotherhood of Teamsters v. Brotherhood of Rail., A. & S. Cl., supra*, 403 F.2d at 204-205, Judge Leventhal, after reviewing *Switchmen's Union*, its ancestors and progeny, and its statutory setting, gives us a jurisdictional formulation of the scope of such review:

> "The nub of the matter is this: The courts must put aside the kinds of disquietude that we have sketched in deference to the doctrine of *Switchmen's Union* that the courts have no

V.

In determining that the Docks Department was a "carrier," the Mediation Board gave a literal reading to 45 U.S.C.A. § 151, First, which provides in relevant part:

> "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, *and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad. . .* (Emphasis supplied.)"

---

jurisdiction to intervene in representation disputes committed by the Railway Labor Act to final Board action. The Act puts a premium on speed of resolution; indeed the Board is directed to resolve representation disputes within 30 days.

"That purpose may be fulfilled only if the courts are extremely chary of involving themselves. The narrow exceptions to the 'jurisdictional' bar created by Leedom v. Kyne, and similar cases must be instances of constitutional dimension or gross violation of the statute. The exception inevitably eliminates any strict concept of lack of jurisdiction, since it permits a peek at the merits. The reconciliation of doctrine lies not in concepts but in practicalities. The retention of the doctrine negativing jurisdiction to consider the merits serves to confine the assertion of jurisdiction to cases where the error on the merits is as obvious on the face of the papers as the violation of specific statutory language, without extension to 'arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide.' As this court has written, the Board's action must be 'so plainly beyond the bounds of the Act, or * * * so clearly in defiance of it, as to warrant the immediate intervention of an equity court.' This case does not bring us to such a pass."

The Mediation Board, as noted earlier in the opinion, found that the Terminal Railroad was concededly a "carrier" and that the State of Alabama controlled both the Docks Department and the Terminal Railroad. Since the Docks Department was "under common control with [a] carrier by railroad," the Mediation Board reasoned that the Docks Department was a "carrier."

The Docks Department argues that the Mediation Board's determination, although in accord with the words of the Act, clearly contravenes the Congressional intent that the Railway Labor Act should regulate only the "railroad world"[14] and its essential adjuncts. In this regard it points out that the Supreme Court has "cautioned against a literal reading of congressional labor legislation; such legislation is often the product of conflict and compromise between strongly held and opposed views, and its proper construction frequently requires consideration of its wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve." *Wirtz v. Local 153, G. B. B. A.*, 1968, 389 U.S. 463, 468, 88 S.Ct. 643, 19 L.Ed.2d 705, 711; accord, *Pan American World Airways v. United Brotherhood of Carpenters*, 9 Cir. 1963, 324 F.2d 217, *cert. denied*, 376 U.S. 964, 84 S.Ct. 1122, 11 L.Ed.2d 982.

---

[14] "The railroad world for which the [Railway Labor] Act was designed has been described as 'a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making.'" *California v. Taylor*, 1957, 353 U.S. 553, 565-66, 77 S.Ct. 1037, 1 L.Ed.2d 1034.

It is argued that Congress did not intend for the Railway Labor Act to apply to facilities under common control with a carrier unless such facilities were closely related to the carrier's railroad transportation activities. See *Northwest Airlines v. Jackson*, 8 Cir. 1950, 185 F.2d 74, 77; *Walling v. Baltimore Steam Packet Co.*, 4 Cir. 1944, 144 F.2d 130. The essence of this argument is reflected in the following language from *Pan American World Airways v. United Brotherhood of Carpenters, supra*, 324 F.2d at 220-21.

> "The purpose of the restrictive provisions of the Railway Labor Act is to keep transportation moving. * * * The statute thus made certain that railroads could not escape the application of the statute to activities closely related to railroad transportation, by having those activities carried on by subsidiary or controlled enterprises. Here the attention of the statute was upon transportation and activities accessory to transportation. Would Congress at the same time and in the same statute, in § 151, Fifth, have intended to make the coverage of the word 'employee' in the Act depend, not at all upon the employee's relation to transportation, but upon the logically irrelevant fact that his employer owned a railroad, in addition to the shoe factory in which the 'employee' worked?
>
> * * *
>
> An intent on the part of Congress to lift the employees of our hypothetical shoe factory, or of our actual Nuclear Research Development Station, out of the legal area occupied by most other workmen in the country who do exactly the same work under exactly the same conditions and surround-

> ings, and place them, for employment relations purposes, in the 'state within a state' occupied by railroad and air transportation workers would be so incongruous as to suggest that there must be some reason, though not readily apparent, why Congress entertained such an intent."

In the *Pan American* case the issue was whether employees of Pan American (a carrier) who were involved in preventive maintenance of electrical equipment and fuel storage facilities at a nuclear research development station were covered by the Railway Labor Act. The Ninth Circuit held that these employees had "nothing to do with transportation by air or rail" and therefore that they were not covered by the Act. *Id.* at 219.

The Docks Department maintains that this rationale should be applied here. It says that the Terminal Railroad was only a minor part of the dock facility and that the primary function and activity of the docks is the loading, unloading, and storage of waterborne freight. Since the commercial emphasis of the facility is water rather than rail oriented, the Docks Department argues that it would travesty Congressional intent to hold that the Act applied to the facts of this case.[15]

[15] Notwithstanding arguments to the contrary, the fact that the Docks Department is an agency of the State of Alabama does not of itself foil statutory applicability. Although 45 U.S.C.A. § 151, First, refers to a "*company* . . . under common control with any carrier by railroad," it is well settled that the Railway Labor Act applies to carriers operated by sovereign states as well as to corporations. In *California v. Taylor*, 1957, 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed. 2d 1034, the Supreme Court held:

> "The question presented here is whether the Railway Labor Act . . . applies to the State Belt Railroad, a common carrier owned and operated by the State of California and

See *Allen v. Ocean S. S. Co. of Savannah*, 5 Cir. 1941, 123 F.2d 469, aff'g 36 F.Supp. 851 (steamship company controlled by railroad not "carrier" under identical definition in Carriers Taxing Act).

engaged in interstate commerce. For the reasons hereafter stated, we hold that it does.

* * *

"The fact that the Act's application will supersede state civil service laws which conflict with its policy of promoting collective bargaining does not detract from the conclusion that Congress intended it to apply to any common carrier by railroad engaged in interstate transportation, whether or not owned or operated by a State. The principal unions in the railroad industry are national in scope, and there officials are intimately acquainted with the problems, traditions and conditions of the railroad industry. Bargaining collectively with these officials has often taken on a natural flavor, and agreements are uniformly negotiated for an entire railroad system. '[B]reakdowns in collective bargaining will typically affect a region or the entire nation.' [citation] It is by no means unreasonable to assume that Congress, aware of these characteristics of labor relations in the interconnected system which comprises our national railroad industry, intended that collective bargaining, as fostered and protected by the Railway Labor Act should apply to all railroads. Congress no doubt concluded that a uniform method of dealing with the labor problems of the railroad industry would tend to eliminate inequities, and would promote a desirable mobility within the railroad labor force.

"Finally, the State suggests that Congress has no constitutional power to interfere with the 'sovereign right' of a State to control its employment relationships on a state-owned railroad engaged in interstate commerce. In United States v. California (US) supra, this Court said that the State, although acting in its sovereign capacity in operating this Belt Railroad, necessarily so acted 'in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government.'

"'California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers. . . .'

"That principle is no less applicable here. If California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships. [citations]." 1 L.Ed.2d 1036, 1043-44.

The Mediation Board, attempting to answer the preceding arguments, contends that its "carrier" determination is in accord both with a literal reading of the statute and with the relevant case authority. See *Railroad Ret. Bd. v. Duquesne Warehouse Co.*, 1946, 326 U.S. 446, 66 S.Ct. 238, 90 L.Ed. 192; *Southern Development Co. v. Railroad Ret. Bd.*, 8 Cir. 1957, 243 F.2d 351; *Adams v. Railroad Ret. Bd.*, 9 Cir. 1954, 214 F.2d 534; *Universal Carloading and Dist. Co. v. Pedrick*, 2 Cir. 1950, 184 F.2d 64; *Universal Carloading & Dist. Co. v. Railroad Ret. Bd.*, D.C. Cir. 1948, 172 F.2d 22. Moreover, it argues that the claustrophobic "railroad world" of which the Docks Department speaks so possessively and sentimentally is a world largely enshrined in museums and is unrelated to the expansionist railroad world of the Twentieth Century. The essence of the Mediation Board's argument is that the specific words of the Act cover activities which the early inventors of the iron horse never conceived and that this Court should construe the Act accordingly.

In support of its decision not to bifurcate the Mobile dock facilities between maritime and railroad activities, the Mediation Board relies heavily upon *Railroad Ret. Bd. v. Duquesne Warehouse Co., supra.* In *Duquesne* the Supreme Court held that a carrier-owned warehouse which performed functions analogous to those of the Docks Department at bar was under common control with a carrier by railroad and was therefore subject to the Railroad Retirement Act. The Court explained its decision as follows:

"We have noted the loading and unloading services rendered by Duquesne. The duty of unloading carload freight . . . is a transportation service within the meaning of the Interstate Commerce Act.

"Duquesne's answer is that the service of loading and unlaoding is done by it for its customers, that these services are rendered before railroad transportation has begun or after it has ended, that they are not and cannot be a part of railroad transportation since the tariff of the Pennsylvania forbids it from performing the services. Duquesne's conclusion is that under such circumstances loading and unlaoding are not and cannot be a part of railroad transportation. The question, however, is not whether in these cases the service of loading and unloading is being rendered by the Pennsylvania and is, therefore, in fact a part of its transportation service. It is not whether the affiliate would itself be subject to the Interstate Commerce Act. It is whether a carrier's affiliate is performing a service that could be performed by the carrier and charged for under the line-haul tariffs. If it is a service, it is a transportation service within the meaning of the present Acts. . . . In other words if a service is involved which the railroad could perform as a part of its transportation service, it is within the present Acts. It then makes no difference that it is performed by a carrier affiliate rather than by the carrier itself. We think it plain that the definitions in question include at the very least those activities which would be transportation services when performed by a railroad but which it chooses to have performed by its affiliate." 326 U.S. at 453-55, 90 L.Ed. at 197-98.

We have weighed the arguments of the protagonists and have concluded that the Mediation Board's determination was not clearly "made in excess of its delegated powers and contrary to a specific prohibition in the Act." *Leedom v. Kyne, supra,* 358 U.S. at 188, 3 L.Ed.2d at 214. The statutory enumeration of "carrier" activities, 45 U.S.C.A. § 151, First, clearly indicates latitudinal coverage beyond the mere operation and maintenance of railroad engines, cars, and tracks. It cannot be doubted or disputed that the activities and equipment of the Docks Department do not have some umbilical and functional relation to the Terminal Railroad. Consequently, in view of the statutory words "any company . . . under common control with any carrier by railroad" and the expanding concepts of railroading, we cannot say that the Mediation Board's interpretation of the statute was error of the *magna* or *summa* quality necessary to vest the district court with jurisdiction. *cf. Frito-Lay v. F. T. C.*, 5 Cir. 1967, 380 F.2d 8. We therefore reverse on the ground that the district court was without jurisdiction to enter the injunction prohibiting the Mediation Board from holding the representation election.

Having determined that this controversy is unripe for judicial intervention, we order that the jousting must terminate so that the electoral tournament may proceed. Let the epilogue to this epic be written.

REVERSED.

JUDGMENT.

(Caption Omitted.)

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, in accordance with the opinion of this Court;

It is further ordered that appellees pay to appellants, the costs on appeal to be taxed by the Clerk of this Court.

May 5, 1969

Issued as Mandate:

ON PETITION FOR REHEARING.

Filed Jun. 10, 1969.

(Caption Omitted.)

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX C.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23136

UNITED STATES OF AMERICA,
Appellant,

versus

HOUSTON H. FEASTER, individually and as Director ALABAMA STATE DOCKS DEPARTMENT, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Alabama.

(March 29, 1967.)

Before RIVES, GEWIN, and GODBOLD, Circuit Judges.

GODBOLD, Circuit Judge: This eight-year-old case is before us for the second time. In *United States v. Feaster et al,* 330 F.2d 671 (5th Cir., 1964) we held that the complaint of the United States seeking an injunction against the Alabama State Docks stated a cause of action, and reversed and remanded. On remand the District Court denied the motions of the United States for summary judgment and for a preliminary injunction.

From the order denying the preliminary injunction the United States has appealed under 28 U.S.C.A. 1292 (a). Unable to appeal the denial of summary judgment, the United States seeks to use this §1292(a) appeal to obtain judicial determination that the Alabama State Docks Department is a carrier within the meaning of the Railway Labor Act (45 U.S.C.A. 151 et seq), contending that the undisputed facts as shown by the State's answer and the government's motion for summary judgment establish that the State is a carrier. The State seeks to escape making its records available to the National Mediation Board as provided by 45 U.S.C.A. 152, Ninth, on the ground it is not a carrier and says the same facts relied on by the United States establish it is not a carrier.

It is our opinion that the courts may not at this time properly make a determination of the ultimate question whether the State is or is not a carrier, but that under appropriate standards of judicial review the Mediation Board is entitled to access to the records and to an order of the District Court granting the same.[1]

[1] Nor does the Administrative Procedure Act, 5 U.S.C.A. 1001 et seq. provide a basis for such review. As a general rule, a certification by the Board is not subject to review under the Administrative Procedure Act. E.g., *Kirkland v. Atlantic Coast Line R. Co.*, 167 F.2d 529 (D.C. Cir., 1948) [holding that the Act, as interpreted in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 64 S.Ct. 95, 88 L. ed. 61 (1943), precluded review within the meaning of 5 U.S.C.A. 1009]. Cf. *Air Line Dispatchers Ass'n v. National Mediation Board*, 189 F.2d 685 (D.C. Cir.), cert. denied, 342 U.S. 849, 72 S.Ct. 77, 96 L. ed 641 (1951). Also, the Board's demand for access to the appellee's records and its internal determination of carrier status are not "final agency action" within the meaning of 5 U.S.C.A. 1009(a). §1009 is "merely a declaration of existing law where judicial review is provided." *Atchison, Topeka and Santa Fe Ry. Co. v. United States*, 130 F. Supp. 76 (E.D. Miss.) cert. denied, 350 U.S. 892 (1955). "Finality" for pur-

One of the basic purposes of the Act is to insure "prompt and orderly settlement" of labor disputes. 45 U.S.C.A. 151a. "There was to be no dragging out of the controversy * * *" *Switchmen's Union v. National Mediation Board,* 320 U.S. 297, 305, 64 S. Ct. 95, 88 L. ed. 61, 66 (1943). The very section here involved requires the Board to complete its investigation and certify an employee representative within 30 days after its services are invoked. 45 U.S.C.A. 152, Ninth. After eight years the board has been able to progress only to a determination by it, successfully frustrated to date, that it has jurisdiction to make an investigation.

The District Court had before it the question of the scope of review, if any, when the Board, having administratively determined that the State is a carrier, seeks the assistance of the District Court to obtain records of the State to carry out the required investigation.[2]

---

poses of §1009(a) is determined by application of the traditional tests of ripeness for review. E.g., *Lam Man Chi v. Bouchard,* 314 F.2d 664 (3rd Cir., 1963).

[2] The question is not presented whether at this administrative stage the State could obtain any kind of judicial review of the Board's determination that it is a carrier, by affirmatively seeking equitable relief from the courts based on Board action in excess of its statutory authority or in violation of procedural due process. See *Railway Clerks v. Non-Contract Employees* 380 U.S. 650, 14 L. ed. 2d 133, 85 S. Ct. 1192 (1965); *Boire v. Miami Herald Publishing Co.,* 343 F.2d 17 (5th Cir., 1965) [discussing *Leedom v. Kyne,* 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958)]. As a general rule "[A]dministrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Chicago & S. Air Lines v. Waterman S.S. Corp.,* 333 U.S. 103, 68 S. Ct. 431, 92 L. ed. 568 (1948) and cases therein cited.

It is our opinion that when the Board affirmatively seeks judicial aid as it does here the court is not wholly without power to scrutinize the request. The matter then becomes one of articulating the limits of the court's power to look behind the bare request. The Act gives no subpoena power to the Board; its right to reach records is that given by the last sentence of §152, Ninth: "The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph." But the situation is analogous to subpoena cases. Where an administrative agency issues an authorized subpoena if not honored it must call on a court for an order to enforce it. Here the agency has made demand for access to the records, and it not being honored calls on the court to enforce its authority under the statute to reach the records.

In subpoena cases the Supreme Court has rejected claims that the court must satisfy itself that probable cause exists for the agency's contention that the subject of the subpoena is covered by the statute; the only judicial inquiry to be made in enforcing an agency subpoena is whether the evidence sought is "plainly incompetent or irrelevant to any lawful purpose" of the agency. *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509, 63 S. Ct. 339, 87 L. ed. 424, 429 (1943). See also *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 S. Ct. 494, 90 L. ed. 614 (1946); *Tobin v. Banks & Rumbaugh*, 201 F.2d 223 (5th Cir.), cert. denied, 345 U.S. 942 (1953). In *NLRB v. Northern Trust Co.*, 148 F.2d 24 (7th Cir., 1945), an NLRB subpoena case, the court declined to

permit an employer to question whether he was engaged in interstate commerce and whether his activities affected commerce.

The record contains adequate evidence to support the right of the Board, at this stage, to see the records over the objections of the State. The "proof" of carrier status referred to in the opinion on the first appeal is not "proof" reaching the standard of burden of proof in trial of a civil case at issue, but "proof" sufficient to show that the Board in asking for records, is not making a demand incompetent and irrelevant to its lawful purposes. Before filing suit for injunction the Board made some investigation of the matter of possible carrier status; it postponed its investigation of the representation dispute to give the State an opportunity to present by written statements and briefs its position that it is not a carrier, and for representatives of the State to confer with the Board in Washington.[3] Both sides presented additional factual data to the District Court in affidavit form, in support of and in opposition to, the motion for summary judgment.

[3] The State has, at all stages, objected to the Board's making a determination of carrier status without a hearing. The Board acts more in the capacity of a referee; there is no requirement of a hearing at any stage of the matter. The Board does not enter orders, and its only ultimate finding of fact is the certificate. *Switchmen's Union of North America v. National Mediation Board*, supra. Cf. *Brotherhood of Railway & Steamship Clerks v. Non-Contract Employees*, supra, 380 U.S. at 662: "[T]he Board's duty to investigate is a duty to make such investigation as the nature of the case requires. An investigation is 'essentially informal, not adversary'; it is 'not required to take any particular form.' . . . . Congress has simply told the Board to investigate and has left to it . . . the methods and procedures which it should employ in each case."

In making a determination that the Board has submitted proof sufficient to show that its action was not incompetent or irrelevant to its purpose, and not arbitrary, capricious or without foundation, we do not determine nor indicate any opinion upon whether the State is or is not a carrier within the Act, nor upon any of the other claims and defenses asserted by the State.[4]

---

[4] Nor is there before us any question of the scope of, or procedural circumstances in which there may arise, judicial review after certification by the Board, if issued. Without attempting definitive review of all authorities we make the following observations.

A certified bargaining representative may obtain an injunction to require a carrier to bargain. *Virginian Railway Company v. Systems Federation No. 40*, 300 U.S. 515, 57 S. Ct. 597, 81 L. ed. 789 (1937). [Whether the Board or the United States may seek such an injunction is not clear; see Judge Brown's dictum in *United Industrial Workers of Seafarers, etc., v. Board of Trustees*, 351 F.2d 183, 190 (5th Cir., 1965).] In *Switchmen's Union of North America v. National Mediation Board*, supra, the Court specifically noted that it had not determined the review, if any, available when an equity court is asked for affirmative help in the form of a decree to enforce a certification. But see *Aeronautical Radio, Inc., v. National Mediation Board*, 255 F. Supp. 466 (D.D.C., 1966), where an employer sued to set aside an election and the Teamsters intervened asking an order requiring the employer to bargain. On a factual showing that of 400 employees 174 had voted for the Teamsters but 179 had not voted at all, the court held that although it had no power to set aside the certification, it could, since its assistance was sought by way of a decree in equity, decline its aid on equitable considerations.

This Court reviewed the scope of the Board's authority to determine whether plaintiffs were "employees" within the Act in *National Council of Railway Patrolmen's Union v. Sealy*, 152 F.2d 500 (5th Cir., 1945), a suit by the certified union for injunctive relief to require the carrier to bargain. *Airline Dispatchers Association v. National Mediation Board*, 189 F.2d 685 (D. C. Cir.), cert. denied, 342 U.S. 849, 72 S. Ct. 77, 96 L. ed. 641 (1951) involved judicial review of a determination by the Board that it did not have jurisdiction. The Court distinguished cases where the issue was whether the Board had erroneously resolved a disputed representation case from situations involving the power of the Board to resolve the dispute.

In several cases the courts have, after certification, reviewed claims that Mediation Board action has been in excess of its statutory powers, contrary to specific prohibitions of the Act, or in violation of procedural due process. *Teamsters v. National Mediation Board*, 363 F.2d 311 (D. C. Cir., 1963); *Flight Engineers International Association v. National Mediation Board*, supra; see also *Leedom v. Kynes*, supra (National Labor Relations Act). As to such review before certification; see Note 2, supra.

In *Shields v. Utah, Idaho Central Railroad Co.*, 305 U.S. 177, 59 S. Ct. 160, 83 L. ed. 111 (1938) the Interstate Commerce Commission had determined that the railroad was not an interurban electric railway within the proviso of §151, First, after a hearing held at the request of the Mediation Board under the provisions of that section. The Supreme Court allowed the carrier to seek injunctive relief against criminal sanctions of the Act where certification had issued and the carrier had declined to post notices as required by the Act and as ordered by the Board. *Sprague v. Wahl*, 124 F.2d 767 (7th Cir., 1941) is a similar case. The court applied the standard of *Shields*—whether the ICC in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious—and held that question must be determined upon the evidence produced before the ICC. *Texas Electric Railway Co. v. Eastus*, 25 F. Supp., 825 (N. D. Texas, 1938), aff'd per curiam 308 U.S. 512, 60 S. Ct. 134, 84 L. ed. 437 (1939) is a like case applying the same standard.

There is a suggestion in *Switchmen's Union of North America v. National Mediation Board*, supra, 320 U.S. at 306-07, that *Shields* may not apply to Mediation Board determinations of carrier status, for the Supreme Court emphasized that *Shields* dealt with review of ICC determination of a transportation question in which it had special competency. However, it also distinguished *Shields* on the ground it dealt with the traditional use of equity to enjoin criminal proceedings, a remedy which appears to this Court should be as available to a carrier whose status has been determined by the Mediation Board without hearing as to a carrier whose status has been determined by the ICC after hearing, expecially so since such a Board decision is of a transportation-related problem but made without the expertise of the ICC in that field. On the general subject of procedure and judicial review under §152, Ninth, see Comment, Procedure and Judicial Review Under Section 2, Ninth of the Railway Labor Act, 32 *J. Air L. & Com.* 249 (1966).

We are mindful that the merits of a controversy ordinarily are not to be determined by appeal from an order denying a temporary injunction. However, the merit of this controversy is so narrow—not whether the State is a carrier but whether the Board has met the limited standard of proof required for access to the records—and the Board so clearly has met that standard, that it would achieve no purpose to remand for further hearing.

REVERSED and REMANDED for entry by the District Court of an order granting to the Mediation Board access to the records.

GEWIN, Circuit Judge Dissenting:

The question presented by this appeal is a narrow one. We are called upon to decide whether the trial court abused its discretion in reaching the conclusion that the case was not one in which a preliminary injunction should be issued. I find no abuse of discretion. Accordingly, I would affirm the action of the district court and remand the case to the district court for a hearing on the question of whether the State of Alabama is a "carrier" within the meaning of the Railway Labor Act, 45 U.S.C. 151 First, with relation to the activities of the State in the operation of certain maritime facilities and whether employees in the maritime facilities of the State are employees within the meaning of the Railway Labor Act.

Under the sponsorship of a national policy to encourage water transportation declared by Congress in 1919, Rivers and Harbors Appropriation Act of 1919, 40

Statute 1275, 1286, the State of Alabama has been operating the Alabama State Docks at Mobile for almost 40 years. In connection with the operation, the Terminal Railway was created for the purpose of serving the maritime facilities of the State and to make such facilities "open to the use of all on equal terms." Such an arrangement eliminates the possibility that any privately owned railroad may monopolize the port facilities constructed by the State to encourage the use of water transportation facilities. The Terminal Railway not only serves the maritime facilities, it also serves private industries located on or adjacent to the property owned by the State in the vicinity of the maritime facilities.

There is no dispute as to the status of the employees of the Terminal Railway. It has long and consistently been recognized that the Terminal Railway is subject to the Railway Labor Act and the services of the mediation board have been used in labor disputes involving the Terminal Railway. It is admittedly a carrier within the meaning of the various acts of Congress regulating railroads.

Aside from the Terminal Railway, the maritime facilities consist of the Docks Department, Bulk Material Handling Plant, Grain Elevator, Cotton Compress and Warehouse, Cold Storage Plant, and Bulk Oil Plant. The present controversy relates to those employees of the several departments mentioned (not including the Terminal Railway) except officers of the State Docks Department, office and clerical employees, and employees who are covered by existing collective bar-

gaining agreements pursuant to the provisions of the Railway Labor Act. All of the employees of the Terminal Railway are represented by unions certified under the Railway Labor Act.

The usual function of a preliminary injunction is to preserve the status quo pending a determination of the case on its merits. While there is no absolute standard by which the discretion of a trial judge is to be determined in granting or refusing a preliminary injunction, it is always his duty to balance the relative conveniences of the parties. The very nature of the question dictates the exercise of a broad, general discretion. The action of the district court should not be disturbed unless the record demonstrates a clear abuse of such discretion. *Calagaz v. DeFries* (5 Cir. 1962) 303 F.2d 588, 590; *Bancroft v. Shelley Knitting Mills* (3 Cir. 1959) 268 F.2d 569; *Miami Beach Federal Savings & Loan Assoc. v. Callender* (5 Cir. 1958) 256 F.2d 410, 415; *Jimenez v. Barber* (9 Cir. 1958) 252 F.2d 550; *Burton v. Mantanuska Valley Lines* (9 Cir. 195[illegible]244 F.2d 647, 650-1.

When this case was before us on the former appeal, *United States v. Feaster,* 330 F.2d 671 (1964), we reversed and remanded to the district court under the following mandate:

> "The allegation of carrier status is subject to proof just like any other allegation in the complaint. If it is proved, then the appellees are required to make the records available as sought in the complaint."

The "carrier status" issue is still unresolved. There is a complaint alleging that the employees of the maritime facilities are carrier employees and there is a denial of such status. The issue presented should not be decided by summary judgment procedure but there should be a full and complete hearing. This is especially true because the relief sought by preliminary injunction was not to preserve the status quo but rather to completely change it. *Tanner Motor Livery Ltd. v. Avis, Inc.* (9 Cir. 1963) 316 F.2d 804, 808-9. See also *Switzerland Cheese Association, Inc., et al. v. Horne's Market,* .... U.S. ...., 17 L.ed.2d 23 (1966).[1]

At a full hearing upon the merits, the conflicting contentions of the parties can be resolved. The issue presented is not entirely simple and a decision should be reached only after hearing the evidence. See *Pan American World Airways, Inc. v. United Brotherhood of Carpenters & Joiners of America* (9 Cir. 1963) 324 F.2d 217, cert. den. 376 U.S. 964, 11 L.ed.2d 982; *Northwest Airlines v. Jackson* (8 Cir. 1950) 185 F.2d 74; *Walling v. Baltimore Steam Packet Co.* (4 Cir. 1944) 144 F.2d 130; *Allen v. Ocean S.S. Co. of Savannah* (5 Cir. 1941) 123 F.2d 469.

[1] In the *Switzerland Cheese* case the Court stated:

> "It is earnestly argued however that, although this order denied a permanent injunction, it was nonetheless 'interlocutory' within the meaning of § 1292(a)(1) *because the motion for summary judgment did service for a motion for a preliminary injunction* (see Federal Glass Co. v. Loshin, supra, at 938) and that therefore 'interlocutory' must also include a denial of a permanent injunction.
>
> "We take the other view not because 'interlocutory' or preliminary may not at times embrace denials of permanent injunctions, but for the reason that the denial of a motion for a summary judgment *because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim.* It is strictly a pretrial order that decides only one thing—that the case should go to trial." (Emphasis added)

JUDGMENT.

(Title Omitted.)

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for entry of an order granting to the Mediation Board access to the records, in accordance with the opinion of this Court.

March 29, 1967

Issued as Mandate:

GEWIN, Circuit Judge, dissents.

(Title Omitted.)

ON PETITION FOR REHEARING.

Before RIVES, GEWIN, and GODBOLD, Circuit Judges.

PER CURIAM: It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause is hereby DENIED.

APPENDIX D.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20798

UNITED STATES OF AMERICA,
Appellant,

versus

HOUSTON H. FEASTER, Individually and as Director, ALABAMA STATE DOCKS DEPARTMENT, ET AL,
Appellees.

Appeal from the United States District Court for the Southern District of Alabama.

(April 20, 1964.)

Before TUTTLE, Chief Judge, WISDOM, Circuit Judge, and CARSWELL, District Judge.

TUTTLE, Chief Judge: This is an appeal from a dismissal by the trial court of an action by the United States seeking an injunction to restrain the individual appellees and the state of Alabama, acting through them, from barring access of the National Mediation Board to certain books and records of the Alabama Docks Department. In addition to the restraint sought, the United States prayed that a mandatory injunction

require the named individuals to make the books and the records that are requested available to the National Mediation Board.

The facts can best be understood with a recitation of the statutory background of the case. Section 2, Ninth, of the Railway Labor Act, 45 U.S.C.A. 152, Ninth, provides that the National Mediation Board, a creature of the Act, is to settle representation disputes among carrier employees. In the area of representation disputes, the coverage of the Act is set forth in two definitional sections. The term "carrier" is defined in Section 1 of the Railway Labor Act to include all carriers by railroad subject to the Interstate Commerce Act and "any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service ... in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling property transported by railroads ..." 45 U.S.C.A. 151, First.

The term "employee" as defined in the Act, "includes every person in the service of a carrier ... who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted ... by the Commission." Section 145 U.S.C.A. 151, Fifth.

In fulfillment of its statutory duty to settle representation disputes, the Board is authorized to investigate the underlying facts of the dispute and, for that purpose, to have access to any books and records of the carrier, deemed pertinent by the Board.[1]

The facts are relatively simple. The Alabama State Docks Department is an executive agency of the state of Alabama, which operates the state owned dock facilities. Certain of these facilities are at Mobile, Alabama, and include a terminal railroad subject to the Interstate Commerce Act, warehouses, a grain elevator, a cold storage plant and a cotton compress and bonded warehouse. All of these facilities are owned, operated and controlled by the state through the State Docks Department. Appellee Feaster, as Chief executive officer of the Department, is vested with all the powers and authority of the Department. Appellee Irvine, is general manager of operations of the Department. As of 1958, the National Mediation Board, pursuant to Section 2, Ninth, of the Railway Labor Act, had certified duly designated representatives for certain of the employees of the State Docks Department Terminal Railroad.

In 1959, the International Brotherhood of Firemen and Oilers, Helpers, Roundhouse and Railway Shop

---

[1] "The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragrapb." 245 U.S.C.A. 152, Ninth.

Laborers filed an application with the Board requesting an investigation of a representation dispute among all of the employees of the Department of Mobile except officers of the Department, office clerical employees and employees in the crafts covered by the existing agreements. Thereupon, the Board requested that appellants be permitted to examine those books and records of the State Docks Department which contained the names, addresses and job classifications of the employees involved in the dispute and requested that the appellees furnish the Board with a list containing the required information. Appellees refused to permit the Board to examine the records and refused to furnish the requested information. Thereupon, the suit was filed.

The defendants moved to dismiss the complaint on the grounds, (1) the district court had no jurisdiction to entertain the action; (2) the complaint failed to state a claim against any of the appellees upon which relief could be granted; (3) the complaint was an attempt to obtain an original writ of mandamus which the district court had no jurisdiction to grant. Without indicating the basis for its order, the district court granted the motions to dismiss on April 23, 1963. This appeal followed.

The first question which presents itself on a consideration of this appeal is whether a cause of action exists in favor of the United States against the officers and against the state of Alabama by virtue of the authorization given to the Mediation Board under the provisions of the Interstate Commerce Act.

The State argues that no such cause of action exists. It says, first, that this is a suit in the nature of a petition for writ of mandamus and that it must, therefore, fail because a writ of mandamus has been abolished by the Federal Rules. The simplest answer to this contention is that this is not such a suit. It is a suit to prohibit officials who have custody of certain records, alleged to be records of a "carrier," who, under the circumstances alleged in the complaint, are required to make them available to the Mediation Board, from obstructing rights granted by statute. The law is plain:

> "The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

The fact, if it be true, as alleged by the appellees, "that Feaster and Irvine have no personal interest in the books and records or in the outcome of the purported controversy," is of no significance. They are the persons who, the Government alleges, are resisting the right of the Board to carry out the Congressional mandate. The district court has the power to consider the complaint and if it determines that these defendants are, in fact, in custody of the records, it has the power to enjoin their conduct which denies the access to them which Congress provides the Mediation Board shall have.

The appellees next argue that the complaint fails to set forth a "judiciable" controversy. This argument seems to be based upon the theory announced by the appellees that "administrative agencies do not have the

inherent power to require persons to produce documents." Appellees then point to the fact that Congress did not give the Mediation Board subpoena powers and they deduce from this that Congress did not intend that the language quoted above was meant to be enforced by an original proceeding brought by the United States.

We think the absence of subpoena power and the absence of a specific enactment in the statute providing that the United States or the Board may file suit to enforce the Board's right to access to the records is not dispositive of the case. The Supreme Court has held heretofore in *Steele v. L & N RR Co.*, 323 U.S. 192, that even "an implied" statutory right of Negroes to be fairly represented by the certified bargaining representative of their craft could be enforced by injunction, although the statute gave no specific remedy of this nature. Also, in *Virginian Rwy. v. Federation*, 300 U.S. 515, the Court held that a statutory requirement that the carrier recognize the chosen representative of employees were enforceable by injunction, although no specific right of injunction was stated in the Act.

It is next contended that such an action could not be constitutionally supported because "it is not a case within the meaning of Section 2 of Article 3 of the Constitution which confers judicial power on the federal courts, for no claim of plaintiff is 'brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs.'" As to this point, we conclude that *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, settles the law for the proposition that a pro-

ceeding to enforce an order for the production of books and records is a case or controversy under Article 3 of the Constitution.

The final and most substantial argument presented here by the appellees runs along these lines: The Railway Labor Act defines "employees" as every person in the service of a carrier "who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission." The complaint alleges that the Board desires access to the books and records of the state of Alabama, which show the names, addresses and job classifications of the employees of the Department to enable it to determine whether the persons employed by the Department are employees as defined in certain orders of the Interstate Commerce Commission. The Board does not have authority to make any such determination, but such authority is vested exclusively in the Interstate Commerce Commission.

This argument is fallacious since it reads the complaint as asserting the right of the Board to *define* certain work "as that of an employee or subordinate official," which right is clearly given exclusively to the Interstate Commerce Commission, rather than the right to *determine* whether the particular persons employed by the appellees are actually *performing* "work defined as that of an employee . . . in the orders of the Interstate Commerce Commission." The Board does not claim the right to determine that certain work is or should be railroad employee work; that is the function of the Inter-

state Commerce Commission. It does claim the right to consider the job classifications of certain designated employees and determine whether it considers that they are performing work which the Interstate Commerce Commission orders have theretofore designated as falling within carrier employment.

If the Mediation Board is to perform its duty under the Railway Labor Act at all, it has the right to ascertain initially whether the persons in the employment of a carrier fall within the orders of the Interstate Commerce Commission. It is not required to defer its proceedings and submit to the Interstate Commerce Commission for determination the question whether certain designated employees are or are not within the classifications covered by orders of the Commission. Nothing in the case of *National Council of Railway Patrolmen's Union v. Sealy*, 5 Cir., 150 F. 2d 500, is in conflict with this. That case grew out of an effort by a group of employees who sought to have the Court determine that the work they were doing should properly be "*defined* as that of an employee or subordinate official of a carrier when the Interstate Commerce Commission had issued no order touching the kind of work there being performed." (Emphasis added.) This Court merely affirmed a judgment of the district court contrary to the contention that the work there should be so classified.

Appellees further contend that the failure of the complaint to allege that "the Interstate Commerce Commission has determined that the Alabama State Docks Department is a 'carrier,'." is fatal because, they

say, there must be a prior determination by the Interstate Commerce Commission of the carrier status of the employer of the specific employees as to whom the records are sought before this proceeding can go forward. We think this contention is without any substance. The complaint alleges that "Alabama State Docks Department is a carrier within the meaning of the Act." The Act itself defines a carrier as including "any express company, sleeping car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad, and which operates any equipment or facilities or performs any service (other than trucking services) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad . . . ."

We find no basis for the contention by appellees that there must be a prior determination by the Commission that the particular part of the function performed by the appellees here constitute them a "carrier" before this action can be brought. The allegation of carrier status is subject to proof just like any other allegation in the complaint. If it is proved, then the appellees are required to make the records available as sought in the complaint.

The judgment is REVERSED and the case REMANDED to the district court for further proceedings not inconsistent with this opinion.

APPENDIX E.

CONSTITUTION OF THE UNITED STATES

ARTICLE I SECTION 9 CLAUSE 6—POWERS DENIED TO CONGRESS—PREFERENCE TO PORTS.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

AMENDMENT V—DUE PROCESS OF LAW CLAUSE.

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

APPENDIX F.

SECTION 1, FIRST OF RAILWAY LABOR

45 U.S.C. 151, First

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by, or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing,

storage, and handling of property transported by railroad and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal. the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

APPENDIX G.

SECTION 1, FIFTH OF RAILWAY LABOR ACT

45 U.S.C. 151, Fifth

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate

official in the orders of the Interstate Commerce Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

APPENDIX H.

SECTION 2, NINTH OF THE RAILWAY LABOR ACT

45 U.S.C. 152 Ninth

Ninth. "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of

the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

APPENDIX I.

SECTION 1(3)(a) of INTERSTATE COMMERCE ACT

49 U.S.C. 1(3)(a)

(a) The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

APPENDIX J.

RAILROAD RETIREMENT TAX ACT

26 U.S.C. 3231(a) and (g)

(a) Employer.—For purposes of this chapter, the term "employer" means any carrier (as defined in subsection (g)), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer; except that the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Secretary or his delegate, or upon complaint of any party interested, to determine after hearing whether any line operated by

electric power falls within the terms of this exception. The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, as amended (44 Stat. 577; 45 U.S.C., chapter 8), and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitutions and bylaws of such organizations. The term "employer" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

* * *

(g) Carrier.—For purposes of this chapter, the term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act (49 U.S.C., chapter 1).

APPENDIX K.

RAILROAD RETIREMENT ACT OF 1937 As Amended

45 U.S.C. 228a(a)

(a) The term "employer" means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall

also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, as amended, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and by-laws of such organizations. The term "employer" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

APPENDIX L.

RAILROAD UNEMPLOYMENT INSURANCE ACT

45 U.S.C. 351 (a)(b) and (c)

(a) The term "employer" means any carrier (as defined in subsection (b) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility

or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies, and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, and their State and National legislative committees and their

general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations. The term "employer" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

(b) The term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to chapter 1 of Title 49.

(c) The term "company" includes corporations, associations, and joint-stock companies.

APPENDIX M.

INSURANCE CONTRIBUTIONS ACT (SOCIAL SECURITY ACT)

26 U.S.C. 3121(b)(9)

(b) Employment.—For purposes of this chapter, the term "employment" means any service performed after 1936 and prior to 1955 which was employment for purposes of subchapter A of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1954 either (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service

which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen of the United States as an employee for an American employer (as defined in subsection (h)); except that, in the case of service performed after 1954, such term shall not include—

* * *

(9) service performed by an individual as an employee or employee representative as defined in section 3231;

* * *

APPENDIX N.

NATIONAL LABOR RELATIONS ACT As Amended

29 U.S.C. 152 (2)

The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

APPENDIX O.

FAIR LABOR STANDARDS ACT

29 U.S.C. 213 (b)(2)

The provisions of section 207 of this title shall not apply with respect to * * * any employee of an employer subject to the provisions of part I of the Interstate Commerce Act.

APPENDIX P.

LEGISLATIVE HISTORY OF THE RAILWAY LABOR ACT As Amended

The Railway Labor Act as amended was written by Mr. Eastman, the Federal Coordinator of Transportation. Mr. Eastman in explaining the "salient features of the bill," 73 Cong. Rec. 12396 (1934) had this to say:

> In the paragraph of section 1 marked "First", there is a change in the present definition of the term "carrier." This change is intended to bring within the scope of the act operations which form an integral part of railroad transportation, but which are performed by companies which are not now subject to the Railway Labor Act. The most important illustration is found in the refrigerator-car companies, which own refrigerator cars operated by the railroads and perform certain functions connected with refrigeration service. Another illustration is found in the companies to which railroads have on occa-

sion contracted out their maintenance work on equipment and even on way and structures. The thought is that concerns which function in this way as an integral part of the railroad transportation system should be subject to the same duties and obligations with respect to labor controversies as the railroads themselves and as the express and sleeping-car companies. This object is attained by including in the definition of "carrier" any company "operating any equipment or facilities or furnishing any service included with the definition of the terms 'railroad' and 'transportation' as defined in the Interstate Commerce Act." Perhaps a better way can be found of accomplishing the desired result, but it was thought that this language would serve the purpose.

APPENDIX Q.

PUB. L. No. 764, 76th CONG., 3d SESS. (Aug. 13, 1940), 54 Stat. 785

To provide for more uniform coverage of certain persons employed in coal-mining operations with respect to insurance benefits provided for by certain Federal Acts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 (a) of the Railroad Retirement Act of 1937, "section 1 (a) of the Carriers Taxing Act of 1937, section 1532 (a) of the Internal Revenue Code, and section 1 (a) of the Railroad Unemployment Insurance Act" are amended, effective in the case of each such

Act as of the ~~date~~ of its enactment, by adding at the end of each such section the following new sentence: "The term 'employer' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities."

Sec. 2. "Section 1 (a) of the Railroad Retirement Act of 1935 and paragraph First of section 1 of the Railway Labor Act," as amended, are amended, effective in the case of each such Act as of the date of its enactment, by adding at the end of each such section and paragraph the following new sentence: "The term 'carrier' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities."

Sec. 3. Section 1 (b) of the Railroad Retirement Act of 1937, section 1 (b) of the Carriers Taxing Act of 1937, section 1532 (b) of the Internal Revenue Code, the first paragraph of section 1 (d) of the Railroad Unemployment Insurance Act, section 1 (b) of the Railroad Retirement Act of 1935, and paragraph Fifth of section 1 of the Railway Labor Act, as amended, are amended, in the case of each such Act as of the date of its enactment, by adding at the end of each such section and paragraph the following new paragraph:

"The term 'employee' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple."

Sec. 4. (a) The laws hereby expressly amended, the Social Security Act, approved August 14, 1935, and all amendments thereto, shall operate as if each amendment herein contained had been enacted as a part of the law it amends, at the time of the original enactment of such law.

(b) No person (as defined in the Carriers Taxing Act of 1937) shall be entitled, by reason of the provisions of this Act, to a refund of, or relief from liability for, any income or excise taxes paid or accrued, pursuant to the provisions of the Carriers Taxing Act of 1937 or subchapter B of chapter 9 of the Internal Revenue Code, prior to the date of the enactment of this Act by reason of employment in the service of any carrier by railroad subject to part I of the Interstate Commerce Act, but any individual who has been employed in such service of any carrier by railroad subject to part I of the Interstate Commerce Act as is excluded by the amendments made by this Act from coverage under the Carriers Taxing Act of 1937 and subchapter B of chapter 9 of the Internal Revenue Code, and who has paid income taxes under the provisions of such Act or subchapter, and any carrier by railroad subject to part I of the Interstate Commerce Act which has paid excise taxes under the provisions of the Carriers

Taxing Act of 1937 or subchapter B of chapter 9 of the Internal Revenue Code, may, upon making proper application therefor to the Bureau of Internal Revenue, have the amount of taxes so paid applied in reduction of such tax liability with respect to employment, as may, by reason of the amendments made by this Act, accrue against them under the provisions of title VIII of the Social Security Act or the Federal Insurance Contributions Act (subchapter A of chapter 9 of the Internal Revenue Code).

(c) Nothing contained in this Act shall operate (1) to affect any annuity, pension, or death benefit granted under the Railroad Retirement Act of 1935 or the Railroad Retirement Act of 1937, prior to the date of enactment of this Act, or (2) to include any of the services on the basis of which any such annuity or pension was granted, as employment within the meaning of section 210 (b) of the Social Security Act or section 209 (b) of such Act, as amended. In any case in which a death benefit alone has been granted, the amount of such death benefit attributable to services, coverage of which is affected by this Act, shall be deemed to have been paid to the deceased under section 204 of the Social Security Act in effect prior to January 1, 1940, and deductions shall be made from any insurance benefit or benefits payable under the Social Security Act, as amended, with respect to wages paid to an individual for such services until such deductions total the amount of such death benefit attributable to such services.

(d) Nothing contained in this Act shall operate to affect the benefit rights of any individual under the Railroad Unemployment Insurance Act for any day of unemployment (as defined in Section 1 (k) of such Act) occurring prior to the date of enactment of this Act.

Sec. 5. Any application for payment filed with the Railroad Retirement Board prior to, or within sixty days after, the enactment of this Act shall, under such regulations as the Social Security Board may prescribe, be deemed to be an application filed with the Social Security Board by such individual or by any person claiming any payment with respect to the wages of such individual, under any provision of section 202 of the Social Security Act, as amended.

Sec. 6. Nothing contained in this Act, nor the action of Congress in adopting it, shall be taken or considered as affecting the question of what carriers, companies, or individuals, other than those in this Act specifically provided for, are included in or excluded from the provisions of the various laws to which this Act is an amendment.

Sec. 7. (a) Notwithstanding the provisions of section 1605 (b) of the Internal Revenue Code, no interest shall, during the period February 1, 1940, to the eighty-ninth day after the date of enactment of this Act, inclusive, accrue by reason of delinquency in the payment of the tax imposed by section 1600 with respect to services affected by this Act performed during the period July 1, 1939, to December 31, 1939, inclusive, with respect to which services amounts have been paid as contributions under

the Railroad Unemployment Insurance Act prior to the date of enactment of this Act.

(b) Notwithstanding the provisions of section 1601 (a) (3) of the Internal Revenue Code, the credit allowable under section 1601 (a) against the tax imposed by section 1600 for the calendar year 1939 shall not be disallowed or reduced by reason of the payment into a State unemployment fund after January 31, 1940, of contributions with respect to services affected by this Act performed during the period July 1, 1939, to December 31, 1939, inclusive, with respect to which services amounts have been paid as contributions under the Railroad Unemployment Insurance Act prior to the date of enactment of this Act: *Provided*, That this subsection shall be applicable only if the contributions with respect to such services are paid into the State unemployment fund before the ninetieth day after the date of enactment of this Act.

Approved, August 13, 1940.

APPENDIX R.

NATIONAL MEDIATION BOARD
Washington, D.C. 20572

In the Matter of the Application of

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION AFL-CIO

alleging representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act

involving employees of

HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT

File No. C-3865

NOTICE OF HEARING

June 13, 1969

On March 4, 1968, the International Longshoremen's Association, AFL-CIO filed an application with the National Mediation Board pursuant to Section 2, Ninth, of the Railway Labor Act, alleging the existence of a representation dispute involving employees of the Harris County Houston Ship Channel Navigation District, performing duties described as (1) wharf clerks, office clerical, and storehouse employees (2) guards; and (3) maintenance employees.

During the preliminary investigation of this application, issues were raised which the Board finds require a recorded hearing, at which time opportunity will be afforded to present oral and written proof.

The primary issue raised is whether the Harris County Houston Ship Channel Navigation District is subject to the jurisdiction of the Railway Labor Act pursuant to Section 1, First, of the Act. Also in issue is the appropriate grouping for craft or class purposes of those employees alleged to be subject to the Railway Labor Act. Sufficient reason appearing therefor,

NOTICE, is hereby given that a public hearing before the National Mediation Board will be held on the issues raised in this proceeding, for Wednesday, July 2, 1969, 11:00 a.m., at the offices of the National Mediation Board, 1230 16th Street, N. W., Washington, D. C.

By direction of the NATIONAL MEDIATION BOARD, this 13th day of June, 1969.

THOMAS A. TRACY
Executive Secretary

Originals to: Mr. J. P. Turner, Executive Director
Harris County Houston Ship Channel
Navigation District
P. O. Box 2562
Houston, Texas 77001

Mr. Thomas W. Gleason, President
International Longshoremen's Association
17 Battery Place
New York, New York 10004

Mr. Ralph A. Massey, President
South Atlantic & Gulf Coast
District, ILA
25 Marine Building
Galveston, Texas

Warner F. Brock, Esquire
Brock & Williams
Suite 250—The Main Building
1212 Main Street
Houston, Texas 77002

L. G. Clinton, Jr., Esquire
Fulbright, Crooker, Freeman,
Bates & Jaworski
Bank of the Southwest Building
Houston, Texas 77002

Copy to: CSA Reporting Corp.
The Reporters Building
300 7th Street, S. W.
Washington, D. C. 20024

APPENDIX S.

NATIONAL MEDIATION BOARD
Washington, D.C. 20572

In the Matter of the Application of

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION AFL-CIO

alleging representation dispute pursuant to Section 2 Ninth, of the Railway Labor Act

involving employees of

SOUTH CAROLINA STATE PORTS AUTHORITY

File No. C-3899

NOTICE OF HEARING

June 13, 1969

On November 15, 1968, the International Longshoremen's Association, AFL-CIO filed an application with the National Mediation Board pursuant to Section 2, Ninth, of the Railway Labor Act, alleging the existence of a representation dispute involving employees of the South Carolina State Ports Authority, performing duties described as loading, unloading, warehousing, moving, storing, checking, clerking and handling of cargo, operating and maintaining equipment and facilities, locomo-

tive engineering, switching and all others engaged in the handling or moving of cargo.

During the preliminary investigation of this application, issues were raised which the Board finds require a recorded hearing, at which time opportunity will be afforded to present oral and written proof.

The primary issue raised is whether the South Carolina State Ports Authority is subject to the jurisdiction of the Railway Labor Act pursuant to Section 1, First, of the Act. Also in issue is the appropriate grouping for craft or class purposes of those employees alleged to be subject to the Railway Labor Act. Sufficient reason appearing therefor,

Notice, is hereby given that a public hearing before the National Mediation Board will be held on the issues raised in this proceeding, for Monday, 11:00 a.m., June 30, 1969, at the offices of the National Mediation Board, 1230 16th Street, N. W., Washington, D. C.

By direction of the NATIONAL MEDIATION BOARD, this 13th day of June, 1969.

THOMAS A. TRACY
Executive Secretary

Originals to: Mr. Capers G. Barr, Jr.
General Manager
South Carolina State Ports Authority
P. O. Box 817
Charleston, South Carolina 29402

Julius Miller, Esquire
Gleason and Miller
300 East 40th Street
New York, New York 10016

Mr. Thomas W. Gleason, President
International Longshoremen's Association
17 Battery Place
New York, New York 10004

Mr. Charles Luna, President
United Transportation Union
15401 Detroit Avenue
Cleveland, Ohio 44107

Mr. C. L. Dennis, International President
Brotherhood of Railway, Airline & Steamship Clerks
1015 Vine Street
Cincinnati, Ohio 45202

Copy to: CSA Reporting Corporation
The Reporters Building
300—7th Street, S. W.
Washington, D. C. 20024

APPENDIX T.

NATIONAL MEDIATION BOARD
Washington, D.C. 20572

In the Matter of the Application of

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION AFL-CIO

alleging representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act

involving employees of

NORTH CAROLINA STATE PORTS AUTHORITY

File No. C-3900

NOTICE OF HEARING

June 13, 1969

On November 15, 1968, the International Longshoremen's Association, AFL-CIO filed an application with the National Mediation Board pursuant to Section 2, Ninth, of the Railway Labor Act, alleging the existence of a representation dispute involving employees of the North Carolina State Ports Authority, located at Wilmington, North Carolina and Morehead City, North Carolina, performing duties described as loading, unloading, warehousing, moving, storing, checking, clerking, and

handling of cargo, operating and maintaining equipment and facilities, locomotive engineering, switching and all others engaged in the handling or moving of cargo, also all security employees.

During the preliminary investigation of this application, through exchange of correspondence, issues were raised which the Baord finds require a recorded hearing, at which time opportunity will be afforded to present oral and written proof.

The primary issue raised is whether the North Carolina State Ports Authority is subject to the jurisdiction of the Railway Labor Act pursuant to Section 1, First, of the Act. Also in issue is the appropriate grouping for craft or class purposes of those employees alleged to be subject to the Railway Labor Act. Sufficient reason appearing therefor,

Notice, is hereby given that a public hearing before the National Mediation Board will be held on the issues raised in this proceeding, for Tuesday, 11:00 a.m., July 1, 1969, at the offices of the National Mediation Board, 1230 16th Street, N. W., Washington, D. C.

By direction of the NATIONAL MEDIATION BOARD, this 13th day of June, 1969.

THOMAS A. TRACY
Executive Secretary

Originals to: Mr. Ralph Moody
Deputy Attorney General
State of North Carolina
Department of Justice
P. O. Box 629
Raleigh, North Carolina 26702

Julius Miller, Esquire
Gleason and Miller
300 East 40th Street
New York, New York 10016

cc-to: CSA Reporting Corp.
The Reporters Building
300-7th Street, S. W.
Washington, D. C. 20024

APPENDIX U.

NATIONAL MEDIATION BOARD
Washington, D.C. 20572

In the Matter of the Application of
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION AFL-CIO

alleging representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act

involving employees of

SAVANNAH STATE DOCKS RAILROAD COMPANY

File No. C-3902

NOTICE OF HEARING

June 13, 1969

On August 26, 1968, the International Longshoremen's Association, AFL-CIO filed an application with the National Mediation Board pursuant to Section 2, Ninth, of the Railway Labor Act, alleging the existence of a representation dispute involving employees of the Savannah State Docks Railroad Company, performing duties described as "All employees of Georgia Ports Authority at Savannah, Georgia, engaged in loading, unloading, warehousing, moving, storing, checking, clerking and handling of cargo, operating and maintaining equipment and facilities, locomotive engineering switch-

ing and all others engaged in the handling or moving of cargo."

During the preliminary investigation of this application, issues were raised which the Board finds require a recorded hearing, at which time opportunity will be afforded to present oral and written proof.

The primary issue raised is whether the Savannah State Docks Railroad Company is subject to the jurisdiction of the Railway Labor Act pursuant to Section 1, First, of the Act. Also in issue is the appropriate grouping for craft or class purposes of those employees alleged to be subject to the Railway Labor Act. Sufficient reason appearing therefor,

Notice, is hereby given that a public hearing before the National Mediation Board will be held on the issues raised in this proceeding, for Thursday, 11:00 a.m., July 3, 1969, at the offices of the National Mediation Board, 1230 16th Street, N. W., Washington, D. C.

By direction of the NATIONAL MEDIATION BOARD, this 13th day of June, 1969.

THOMAS A. TRACY
Executive Secretary

Originals to: Mr. J. B. Donaldson, Jr.
General Superintendent
Savannah State Docks Railroad Company
P. O. Box 1039
Savannah, Georgia 31402

Mr. J. D. Holt, Executive Director
Georgia Ports Authority
P. O. Box 2406
Savannah, Georgia 31402

Julius Miller, Esq.
Gleason and Miller
26 Beaver Street
New York, New York 10004

Copy to: CSA Reporting Corp.
The Reporters Building
300-7th Street, S. W.
Washington, D. C. 20024

APPENDIX V.

EXCERPT FROM MEMORANDUM FOR THE UNITED STATES IN OPPOSITION.

Feaster v. United States of America,
389 US 920 (1967).

Thus, the disagreement in this case is over the question of whether the Board has the authority to make a threshold determination of jurisdiction, without the necessity of a determination by the Interstate Commerce Commission that the employer involved is a "carrier" within the meaning of the Act . . . and, if so, whether on the basis of the evidence adduced in the district court, there was a sufficient showing as to "carrier" status of the Alabama State Docks Department to demonstrate that the administrative demand for records was not plainly incompetent or irrelevant to a lawful purpose.

Supreme Court of the United States

JOHN F. DAVIS, CLERK

OCTOBER TERM, 1969

No. 558

HOUSTON H. FEASTER, individually and as Director, Alabama State Docks Department, and the STATE OF ALABAMA,

Petitioners,

versus

UNITED STATES OF AMERICA and WARREN S. LANE, as Mediator, National Mediation Board,

Respondents.

BRIEF OF THE GEORGIA PORTS AUTHORITY AS AMICUS CURIAE.

EARLE PHILLIPS,
WILLIAM W. ALEXANDER, JR.,
26 Pryor Street, N.E.,
Atlanta, Georgia 30303,
Attorneys for Amicus Curiae.

ARTHUR K. BOLTON,
Attorney General, State of Georgia,
Georgia Department of Law,
132 State Judicial Building,
Atlanta, Georgia 30334.

HAROLD N. HILL, JR.,
Executive Assistant Attorney General.

COURTNEY STANTON,
Assistant Attorney General.

INDEX

	Page
STATEMENT OF INTEREST	1
ARGUMENT	4
A Substantial Federal Question Is Presented Which Shows The Necessity For Uniform Application of Railway Labor Legislation Pursuant To A Determination By The Interstate Commerce Commission	4
A Substantial Federal Question Is Presented As To Whether Congress Intended The Railway Labor Act To Apply To Non-Railroad Employees Of The Type Here Involved	9
CONCLUSION	14
CERTIFICATE OF SERVICE	15

LIST OF AUTHORITIES.

Cases:

Alabama Great Southern Ry. Co. v. Federal Maritime Commission, 379 F.2d 100 (D.C. Cir. 1967) . . . 7

Alabama State Docks Department v. Alabama, Tennessee & Northern R. Co., 323 I.C.C. 185 . . . 8

Allen v. Ocean S.S. Co. of Savannah, 123 F.2d 469 (5th Cir. 1941) . . . 5, 9

LIST OF AUTHORITIES—(Continued):

Cases—(Continued): Page

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., ... U.S. . . . ., 22 L.Ed.2d 344 (1969), reh. den. . . . U.S. 8

California v. Taylor, 353 U.S. 553 (1957) 4

Central Stikstof Verkoopkantoor N.V. v. Alabama State Docks Department, ... F.2d . . . ., No. 24045 (5th Cir. 1969) 7

Denver & Rio Grande Western R. Co. v. Union Pacific R. Co., 287 I.C.C. 611 8

Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776, 346 U.S. 485 (1953) 8

Holy Trinity Church v. United States, 143 U.S. 457 9

Interchange of Freight at Boston Piers, 253 I.C.C. 703 (1942) 7

Interchange of Freight at Boston Terminals, 2 U.S.M.C. 671 (1942) 7

International Assn. of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963) reh. den. 373 U.S. 947 8

International Longshoremen's Assn. v. Georgia Ports Authority, 217 Ga. 712 (1962), cert. den. 370 U.S. 922 2

McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) 9

National Council of Railway Patrolmen's Unions v. Sealy, 152 F.2d 500 (5th Cir. 1945) . . . 9

N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58 (1964). . . 10

LIST OF AUTHORITIES—(Continued):

Cases—(Continued): Page

National Woodwork Mfgrs. Assn. v. N.L.R.B., 386 U.S. 612 (1967), reh. den. 387 U.S. 926 . . . 10
Pan American World Airways, Inc. v. United Brotherhood of Carpenters & Joiners of America, 324 F.2d 217 (9th Cir. 1963), cert. den. 376 U.S. 964 . . . . . 6, 10
Shields v. Utah-Idaho Central R. Co., 305 U.S. 177 (1938) 9
Swift & Co. v. United States, 316 U.S. 216 (1942) . . 7
Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957) 8, 10
Union Stockyard & Transit Company of Chicago, 3 N.M.B. 149 (1953); 3 N.M.B. 156 (1953) . . . 7
United States v. Feaster, 410 F.2d 1354 (5th Cir. 1969). 7, 9
Walling v. Baltimore Steam Packet Co., 144 F.2d 130 (4th Cir. 1944) 5
Wirtz v. Local 153, Glass Bottle Blowers Assn., 389 U.S. 463 (1968) 10

Statutes:

Fair Labor Standards Act, 29 U.S.C.201 5
Federal Insurance Contributions Act, 26 U.S.C. 3121 (b) (9) 5
Georgia Code Annotated, Chapter 98-2 2
Georgia Laws, 1945, p. 464 2
Interstate Commerce Act, 49 U.S.C. 1(3)(a) . . . 4, 7
National Labor Relations Act, 29 U.S.C. 152(2) . . 5
Railroad Retirement Act, 45 U.S.C. 228a(a) 4
Railroad Retirement Tax Act, 26 U.S.C. 3231 (a), (g) 4

LIST OF AUTHORITIES—(Continued):

Statutes—(Continued): Page

Railroad Unemployment Insurance Act, 45 U.S.C. 351 (a), (b), (c) 4

Railway Labor Act:

45 U.S.C. 151, First 4, 9

45 U.S.C. 151, Fifth 9

Miscellaneous:

Report of Hearings of the Senate Committee on Interstate Commerce on S.3266, 73d Congress, Second Session 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 558.

HOUSTON H. FEASTER, individually and as Director, Alabama State Docks Department, and the STATE OF ALABAMA,

Petitioners,

versus

UNITED STATES OF AMERICA and WARREN S. LANE, as Mediator, National Mediation Board,

Respondents.

BRIEF OF THE GEORGIA PORTS AUTHORITY AS AMICUS CURIAE.

STATEMENT OF INTEREST.

The Georgia Ports Authority (hereinafter the Authority) is a body corporate and politic created by the General Assembly of the State of Georgia and is an instrumentality of the State of Georgia and a public corporation. In the operation of public ports at various locations in the State of Georgia, it carries out its corporate purpose for the benefit of the people of Georgia, performing an essential governmental function for a public purpose and for a public benefit as a creature of the State. It has authority to acquire, construct, maintain, and operate harbors and seaports,

together with all necessary or desirable facilities therefor, including rail facilities within its properties. *Ga. Laws*, 1945, p. 464, as amended; *Ga. Code Ann.*, Chapter 98-2.

The Georgia Ports Authority operates six port terminal facilities at five Georgia cities. At Savannah, Georgia, it operates two seaport terminals, the Garden City Terminal and the Ocean Terminal, through a subsidiary organization, the Savannah State Docks and Warehouses (hereinafter the Warehouses). Both terminals have berths, sheds, warehouse and cargo handling facilities and equipment. At the Ocean Terminal, all rail interchange and switching is performed by personnel and equipment of the Central of Georgia Railroad, a privately owned Class I rail carrier. At the Garden City Terminal, rail interchange and switching is performed by personnel and equipment of the Savannah State Docks Railroad Company (hereinafter the Railroad Company), a subsidiary operation of the Georgia Ports Authority, pursuant to switching authority granted by the Interstate Commerce Commission. The organization, operating officers, employees, property and operations of the Railroad Company are separate and apart from those of the Warehouses and the Authority. Under Georgia law "... the State Ports Authority in the operation of the docks and warehouses at its Savannah terminals (is) without authority to enter into an agreement with any third party fixing the terms and conditions of the employment of personnel working for the Authority." *International Longshoremen's Assn. v. Georgia Ports Authority*, 217 Ga. 712 (1962), cert. den. 370 U.S. 922.

There is presently pending before the National Mediation Board (hereinafter the N.M.B.), File No. C-3902, a petition filed by the International Longshoremen's Association (hereinafter I.L.A.) for investigation of an alleged representation dispute among, allegedly, certain employees of the Railroad Company, but the employees described include all employees of the Authority at Savannah, Georgia, who are engaged not only in "locomotive engineering switching", but also all those engaged in "loading, unloading, warehousing, moving, storing, checking, clerking and handling of cargo" and even those "operating and maintaining equipment and facilities." See Petition for Writ of Certiorari, Appendix U (hereinafter cited as Pet., App. . .). There are only eight persons employed by the Railroad Company and they are engaged exclusively in providing rail service and are treated as being covered by railway labor legislation. There are approximately 500 persons employed by the Warehouses to handle, check, store, load and unload cargo traveling by ship, motor transport, and rail and to maintain the equipment and facilities of the Warehouses. These employees have never been treated as covered by railway labor legislation, but rather as covered by other federal laws applicable to employees. A hearing in File No. C-3902 was held in Washington, D. C. on August 13, 1969, concerning the issue of N.M.B. jurisdiction over the employees involved, and briefs of the parties have been submitted, but no decision has been rendered.

The Warehouses and the Authority contend that the N.M.B. has no jurisdiction over any employees other than those of the Railroad Company. The I.L.A. contends that N.M.B. jurisdiction extends to employees of all three entities. In the instant case pending certiorari, the N.M.B. asserted jurisdiction over similarly situated employees of the

Alabama Ports Authority. The decision of this Court in this case will substantially affect the Authority, and its subsidiaries, as well as similarly situated ports authorities of other states. For this reason, the Authority files this Brief in support of the petition for certiorari, asking that this Court grant the petition and reverse the Court below.

ARGUMENT.

A Substantial Federal Question Is Presented Which Shows The Necessity For Uniform Application Of Railway Labor Legislation Pursuant To A Determination By The Interstate Commerce Commission.

State ports authorities generally, as have Petitioners in this case, treated their railroad employees performing railroad work as being covered by various statutes relating to railway labor such as the Railway Labor Act, 45 U.S.C. 151, First (see Pet., App. F); the Railroad Retirement Tax Act, 26 U.S.C. 3231 (a), (g) (see Pet., App. J); the Railroad Retirement Act, 45 U.S.C. 228a(a) (see Pet., App. K); the Railroad Unemployment Insurance Act, 45 U.S.C. 351 (a), (b), (c); (see Pet., App. L); and the Interstate Commerce Act, 49 U.S.C. 1(3)(a) (see Pet., App. I). This treats these employees as part of the "a state within a state (which) has its own customs and its own vocabulary and lives according to rules of its own making." *California v. Taylor*, 353 U.S. 553, at 565 (1957). Because divergent rules and standards for railroads, varying with public versus private ownership, could destroy the "uniform method of dealing with the labor problems of the railroad industry" and because railroad problems are often settled on a national basis, this Court has held that such state owned *railroads* are "a vital

link in the national transportation system" and their "continuous operation is important to the national flow of commerce," thus requiring application thereto of the uniform federal scheme of railway labor legislation. *Ibid.*, at 566, 567.

Conversely, state ports authorities, like Petitioner here, have applied a totally different legislative scheme to their non-railroad employees. This scheme is a mixture of state laws on such matters as collective bargaining, civil service status, wages, etc., together with pertinent federal laws such as the Federal Insurance Contributions Act (Social Security Act), 26 U.S.C. 3121(b) (9) (see Pet., App. M); the Fair Labor Standards Act, 29 U.S.C. 201 (see Pet., App. O); and the National Labor Relations Act, 29 U.S.C. 152 (2) (see Pet., App. N). This treatment of non-railroad employees has long been implicitly or explicitly endorsed and approved by federal agencies and courts and should not be lightly disturbed in order to apply to maritime operations a specialized code of relationships, designed for and appropriate for, only a separate industry, the Nation's railroads. *Walling v. Baltimore Steam Packet Co.*, 144 F.2d 130 (4th Cir. 1944); *Allen v. Ocean S.S. Co. of Savannah*, 123 F.2d 469 (5th Cir. 1941).

The choice of schemes inherent in a decision determining Railway Labor Act applicability carries its own inherent and inevitable choice of the entire scheme of federal railway labor legislation, as the definitions of "carriers" and "employees" is closely analogous, indeed identical in effect, among these statutes. A substantial federal question regarding the scope of

railway labor legislation is presented in a context of attempted expansion of that scope to encompass employees and activities which have never been treated as subject thereto. The rationale applied to bring a state railroad within the scope of the federal railway labor legislation is inapposite to the question of coverage of state maritime facilities whose total concern is with maritime trade. In regard to these maritime facilities, there is not the problem of interconnecting carriers with differing rules nor of state enclaves where the federal writ does not run to identical activities performed by identical employee classifications.

Further, the varied state port authorities compete with one another for trade. Yet, dependent upon the vagarities of railroad ownership, one might be covered by railway labor legislation in its entire operation, while another might be free to operate under a different, and perhaps competitively advantageous, scheme. Thus, were the rail services at a state port performed solely by a privately owned railroad, there would presumably be no basis for "carrier" status of the state port. Conversely, simple operation by a subsidiary of rail facilities should not be the sole factor determining "carrier" status of all activities carried on by the parent organization. Cf. Brief of Solicitor General of the United States as Amicus Curiae, in *Pan American World Airways, Inc. v. United Brotherhood of Carpenters & Joiners of America*, 324 F.2d 217 (9th Cir. 1963), cert. den. 376 U.S. 964.

Further, the state ports authorities are subject to regulation by the Federal Maritime Commission. The jurisdiction of this Commission may easily overlap and conflict

with the claimed jurisdiction of the N.M.B. or the Interstate Commerce Commission. Some determination must be made of the jurisdictional claims, for it is clear that the jurisdiction of the I.C.C. ceases where that of another federal agency begins. *Alabama Great Southern Ry. Co. v. Federal Maritime Commission*, 379 F.2d 100 (D.C. Cir. 1967); *Swift & Co. v. United States*, 316 U.S. 216 (1942). The N.M.B. recognizes the jurisdictional limits of the I.C.C., once determined, as the limits of its jurisdiction. *Union Stockyard and Transit Company of Chicago*, Cases Nos. R-2626, C-2073, 3 N.M.B. 149 (1953), 3 N.M.B. 156 (1953). The I.C.C. and the F.M.C. have even jointly determined their respective jurisdictions in the past. *Interchange of Freight at Boston Piers*, 253 I.C.C. 703 (1942); *Interchange of Freight at Boston Terminals*, 2 U.S.M.C. 671 (1942).

The consequences of diverse determinations is shown in the case of Petitioner. Thus the N.M.B. has determined Petitioner is a "carrier" and has asserted jurisdiction over Petitioner's non-rail employees. This determination, while not completely endorsed by the court below, was found not to be "error of the *magna* or *summa* quality" which could now be reviewed and the N.M.B. result was allowed to stand. *United States v. Feaster*, 410 F.2d 1354, at 1368-1372 (5th Cir. 1969) (see Pet., App. B). On the other hand, the same court has just determined in a subsequent case that the Alabama State Docks Department is *not* a common carrier under the Interstate Commerce Act. *Central Stikstof Verkoopkantoor, N.V. v. Alabama State Docks Department*, ... F.2d .... (5th Cir., No. 24045, decided August 15, 1969). The I.C.C. has allowed state ports such as Petitioner to avail themselves of the rate adjustment complaint procedures of Section 3(1) of the Interstate Commerce Act,

49 U.S.C. 3(1), *see Alabama State Docks Department v. Alabama, Tennessee & Northern R. Co.*, 323 I.C.C. 185, while denying the same right to rail carriers, *see Denver & Rio Grande Western R. Co. v. Union Pacific R. Co.*, 287 I.C.C. 611, thus differentiating rail carriers from state maritime authorities.

Thus a substantial federal question of state-federal relationships arises under the Railway Labor Act presenting the question of federal control of a state's employment and personnel policies. The substantial interests of the several states, which both parallel and oppose one another, require a uniform code to govern the relationships of all states with all their port employees. This Court has recognized often that there is a manifest need for uniformity in the application of federal labor laws, including railway labor legislation. *International Assn. of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 691-692 (1963), reh. den. 373 U.S. 947; *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 456-457 (1957); *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776*, 346 U.S. 485, at 490-491 (1953). This Court has this year reiterated this need for uniformity in regard to state regulation of railroads clearly subject to the Railway Labor Act. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, ... U.S. ...., 22 L.Ed.2d 344 (1969), reh. den. .... U.S. ..... This uniformity can be attained only by consideration and resolution of this question by the Interstate Commerce Commission, the one tribunal whose determination, perhaps jointly made with other involved agencies, will settle all questions of jurisdiction and whose expertise to make the determination of "carrier" and "employee" status has been specifically recognized by the Congress and the Courts.

45 U.S.C. 151, First, Fifth; *Shields v. Utah-Idaho Central R. Co.*, 305 U.S. 177 (1938); *National Council of Railway Patrolmen's Unions v. Sealy*, 152 F.2d 500 (5th Cir. 1945).

Such a determination will settle a substantial and delicate question of federal-state relationships, a consideration which looms as large in the interests of the Nation as the delicate questions of international relations involved in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

A Substantial Federal Question Is Presented As To Whether Congress Intended The Railway Labor Act To Apply To Non-Railroad Employees Of The Type Here Involved.

The correct approach to federal labor legislation is to consider the legislative background of the statute and to give it "a broad common-sense construction rather than a narrow one, sounding in mere logomachy." *Allen v. Ocean S.S. Co. of Savannah*, *supra*, 470. The assertion of jurisdiction by the N.M.B. over the non-railroad employees of Petitioner has been based entirely upon a literal interpretation of Section 1, First of the Railway Labor Act, 45 U.S.C. 151, First, and has been endorsed by the Court below on such a basis, *see United States v. Feaster*, *supra*, at 1368-1372. Yet this Court has consistently pointed out the dangers of a literal reading of federal labor legislation, noting that it is often the product of compromise between strong conflicting views and reiterating the warning of *Holy Trinity Church v. United States*, 143 U.S. 457, 459, that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its

makers." *See, National Woodwork Mfgrs. Assn. v. N.L.R.B.*, 386 U.S. 612, 619 (1967), reh. den. 387 U.S. 926, and cases there cited; *Wirtz v. Local 153, Glass Bottle Blowers Assn.*, 389 U.S. 463, 468 (1968); *Textile Workers Union of America v. Lincoln Mills of Alabama, supra*, 458. Such a literal approach to the Railway Labor Act by the N.M.B. in its Case No. C-2202 was condemned by the Ninth Circuit in *Pan American World Airways v. United Brotherhood of Carpenters & Joiners of America, supra*, and by the Solicitor General in his brief as amicus curiae on the petition for certiorari therein, and certiorari therein was denied by this Court. Yet this thoroughly discredited approach to the complex questions of national labor policy has again been successfully (thus far) espoused, requiring that this Court grant certiorari to determine if such a literal approach is correct in this case.

Turning to the legislative history of the current Railway Labor Act, we find that in enacting the definition of a "carrier" in a form more expansive than predecessor definitions, Congress appears to have had a "narrow focus" aimed at a specific character of abuses and at a specific class of "isolated evils", Cf. *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 63 (1964). The abuse sought to be corrected was the use by railroads of subsidiary organizations which the railroads controlled to perform work that otherwise would have to be performed by railroad employees and thus to escape application of railway labor legislation to large groups of employees whose employment was, in fact, under the control of the railroads through their subsidiary shells.

That this was the evil understood by Congress to be corrected is shown by the testimony of the sponsor and author of the Railway Labor Act, Joseph B. Eastman, the Federal Coordinator of Transportation, before the Senate, as contained in the *Report of Hearings of the Senate Committee on Interstate Commerce on S.3266, 73d Congress, Second Session*. In his original appearance, Mr. Eastman noted that the new "carrier" definition sought to cover such companies as refrigeration car companies and structures and equipment maintenance companies which functioned as "an integral part of the railway transportation system." The definition then proposed incorporated into the term "carrier" companies who were "operating any equipment or facilities or furnishing any service included within the definition of the terms 'railroad' and 'transportation' as defined in the Interstate Commerce Act." *Ibid.*, 10-11. George M. Harrison, testifying on behalf of 21 railway labor unions, stated their primary concern to be with broadening the Act to encompass "railroad owned and operated refrigerator car lines." *Ibid.*, 35. The railroads' spokesman, M. W. Clement, objected to the scope of the definition as bringing under the Act companies which did not belong there. *Ibid.*, 56-59. Mr. Eastman then redrafted the definition of a "carrier" in the bill to read as it now reads in pertinent part. He testified that he had so drawn it to avoid "possible conflicts with N.R.A. Codes" which covered non-rail industries and "not to go beyond carriers and their subsidiaries engaged in transportation." This narrowing of coverage to "railroad subsidiaries" was to avoid getting "into the outside field." *Ibid.*, 145-146. Congress then passed the bill containing the definition as finally proposed by Mr. Eastman.

Thus it appears probable that Congress did not intend that a company which was engaged primarily in another business should be treated as a "carrier" because it might own or control a small railroad, but rather that subsidiaries of railroad companies, performing work closely related to railroad transportation, should not escape coverage merely because of technically separate incorporation. The coverage was to flow down from a central controlling stream, not percolate upward from a minor spring. The literal approach espoused by the N.M.B., in the case of the Authority, presumably makes the status of the eight employees of the Railroad Company control the status of nearly 500 employees of the Warehouses where the Railroad Company does not control and it is not able to control or manipulate the Warehouses or the Authority. The "tail wags the dog." Such an absurd result does not appear intended by Congress nor does it evidence a rational approach to the complex problem of the industrial relations of a maritime facility.

This Court should not decline to decide the questions here presented, as did the court below, on the ground that the administrative processes have not yet been finally exhausted. Slavish deference to that essentially sound principle will only result in an extensive period of uncertainty and multitudious litigation for the many state ports authorities over whom the N.M.B. now appears to be asserting jurisdiction. Such uncertainty may itself forment labor strife. It will upset delicate balances in federal state relationships which rank as high in national priority as the relationships of the Nation to other nations. The exhaustion of the administrative process will not preclude judicial review of the ultimate question of whether the N.M.B. has acted in excess of its delegated authority. The court below found only an ab-

sence of error of sufficient magnitude to invoke its jurisdiction, leaving open for later review the question of error itself. From the history of the present case, and the pendency of similar proceeding involving other state ports authorities, the conclusion is inescapable that this precise question will ultimately be presented for determination. Additionally, there is no substantial interference with administrative discretion of decision making in now proceeding to determine "carrier" status. This determination of status by the N.M.B., in the case of Petitioner, has been made and an election directed. Only the ministerial certification of election results remains as part of the administrative process. Thus this court may review and decide the "carrier" question at a time when it will enhance the administrative process rather than impede it.

CONCLUSION.

For the reasons shown, granting of a writ of certiorari by this honorable Court is clearly justified, and the petition for a writ of certiorari should be granted to settle the substantial federal questions involved.

Respectfully submitted,

ARTHUR K. BOLTON,
Attorney General of the State of Georgia,
132 State Judicial Building,
Atlanta, Georgia 30334.

HAROLD N. HILL, JR.,
Executive Assistant Attorney General.

COURTNEY STANTON,
Assistant Attorney General.

ERLE PHILLIPS,
WILLIAM W. ALEXANDER, JR.,
26 Pryor Street, N.E.,
Atlanta, Georgia 30303.

October, 1969

CERTIFICATE OF SERVICE.

I, Erle Phillips, one of the attorneys for the Georgia Ports Authority, amicus curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the .... day of October 1969, I served copies of the foregoing Brief of the Georgia Ports Authority as amicus curiae on the several parties thereto, as follows:

On the United States and on Warren S. Lane, as Mediator, National Mediation Board, by mailing a copy thereof in a duly addressed envelope with air mail postage prepaid to Charles S. Whitespunner, Esquire, United States Attorney for the Southern District of Alabama, at Room 311, Federal Building, Mobile, Alabama, and by mailing a copy in a duly addressed envelope with air mail postage prepaid to The Solicitor General, Department of Justice, Washington, D. C. 20530.

On Houston H. Feaster, individually and as Director Alabama State Docks Department, and on the State of Alabama by mailing a copy thereof in a duly addressed envelope with air mail postage prepaid to Willis C. Darby, Jr., Esquire, Post Office Box 2565, Mobile, Alabama 36601, and by mailing a copy thereof in a duly addressed envelope with air mail postage prepaid to Hon. MacDonald Gallion, Attorney General of the State of Alabama, Montgomery, Alabama.

ERLE PHILLIPS,
Attorney for Amicus Curiae,
26 Pryor Street, N. E.,
Atlanta, Georgia 30303.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 558

HOUSTON H. FEASTER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 35–72) is reported at 410 F. 2d 1354. The findings and conclusions of the district court (Pet. App. 19–31) are unreported. The decisions on prior appeals of this case are reported at 330 F. 2d 671 (Pet. App. 85–93), and 376 F. 2d 147, certiorari denied, 389 U.S. 920 (Pet. App. 73–83).

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1969. A petition for rehearing was denied on June 10, 1969. The petition for a writ of certiorari was filed September 5, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court had jurisdiction to enjoin the National Mediation Board from holding an election to resolve a representation dispute among certain employees of the Alabama State Docks Department.

STATUTE INVOLVED

The relevant provisions of the Railway Labor Act are set forth in the appendix to the petition (Pet. App. 94–97).

STATEMENT

On July 27, 1959, the International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers filed an application with the National Mediation Board for an investigation of a representation dispute involving certain employees of the Alabama State Docks Department (Pet. App. 25). The Docks Department is an agency of the State of Alabama, operating publicly owned port facilities at Mobile (Pet. App. 20–21).

Initially, the Board determined that the Docks Department was a "carrier" under Section 1 of the Railway Labor Act, 45 U.S.C. 151 First, and thus that it had jurisdiction under Section 2 Ninth of the Act, 45 U.S.C. 152, Ninth (Pet. App. 25). Pursuant to its duty under Section 2 Ninth to investigate representation disputes, the Board then requested access to those records of the Docks Department which contained the names, addresses and job classifications of the employees involved. The Docks Department refused access to its records and refused to furnish the requested

information, contending that it was not a "carrier" subject to the Board's jurisdiction under the Railway Labor Act.

The United States brought the present action in September 1961, seeking to enjoin the State and the Docks Department officials from barring access to the pertinent records. The district court dismissed the complaint in April 1963, without stating its reasons. In April 1964, the court of appeals reversed and remanded for further proceedings. *United States* v. *Feaster,* 330 F. 2d 671.

The government then moved for summary judgment and for a preliminary injunction. In September 1965, this motion was denied. In March 1967, the court of appeals again reversed, and ordered that the Mediation Board be granted access to the pertinent records. The court held that the Board had made a sufficient preliminary showing of the "carrier" status of the Docks Department to warrant access to the records. *United States* v. *Feaster,* 376 F. 2d 147, 151 (Pet. App. 80). The Docks Department filed a petition for rehearing, which was denied (Pet. App. 84), and then a petition for certiorari, which was also denied (389 U.S. 920).

After examining the Department's records and determining which were the eligible employees, the Board scheduled a representation election for March 8, 1968. The Docks Department refused, however, to post notices of the election, and secured an injunction from the same district court prohibiting the election on the ground that the Department was not a "car-

rier" subject to the Railway Labor Act (Pet. App. 19–34).

The court of appeals once more reversed, holding that the administrative proceedings were not yet ripe for judicial review because the election had not yet been held and the Board had not yet issued a representation certificate—the certificate being "'the ultimate finding of fact prerequisite to enforcement by the courts'" (Pet. App. 54, quoting *Virginian R. Co.* v. *System Federation,* 300 U.S. 515, 562). It is from this order that petitioners now seek certiorari.

ARGUMENT

The court of appeals' decision correctly applied the principle that judicial review of administrative action is generally limited to final orders or determinations, and reflects the basic policy of the Railway Labor Act to provide fast and convenient settlements of labor representation disputes with minimal judicial interruption of the administrative process.

1. Ordinarily, a district court may not review administrative proceedings prior to the agency's final determination. *Myers* v. *Bethlehem Shipbldg. Corp.,* 303 U.S. 41; *Chicago Automobile Trade Association* v. *Madden,* 328 F. 2d 766 (C.A. 7), certiorari denied, 377 U.S. 979.

The Board has not yet issued a representation certificate. It has only investigated the dispute, found that it has jurisdiction and ordered an election. Thus, there has not yet been a final order or determination by the Board subject to judicial review. *Virginian R. Co.* v. *System Federation, supra.*

2. Relying on *Leedom* v. *Kyne*, 358 U.S. 184, however, petitioners argue that the Board's assumption of jurisdiction is reviewable before the final administrative action because the Board has acted "in excess of [its] delegated powers." The present case does not, however, fall within the "narrow limits" of *Kyne*. *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481; *Railway Clerks* v. *Noncontract Employees*, 380 U.S. 650, 659–660. As the court of appeals held, the Board's assumption of jurisdiction over the Docks Department was not so clearly in excess of its powers as to require immediate judicial intervention.

The statutory definition of "carrier" in Section 1 First of the Act includes "any company which is * * * under common control with any carrier by railroad and which operates any equipment or facilities or performs any service * * * in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad * * *." 45 U.S.C. 151 First. Under the literal terms of this definition, the Board was acting well within its authority. The Terminal Railway, which the Docks Department operates at the Mobile port, is undeniably a "carrier" (Pet. App. 40–41, n. 5). It is under the common control, with the Docks Department, of the State of Alabama. The facilities of the Docks Department include general cargo piers, warehouses, a grain elevator, a cold storage plant, a plant for the storage and loading of edible fats and oils and a special unloading facility for bulk ores (Petition of Docks Department to I.C.C.,

App. 37a, 38a).[1] These facilities handle goods transported to or from the Mobile port by railroad (*Id.* at 38a–45a). It is by no means obvious that the Board is acting in excess of its powers in regarding these facilities as part of the "railroad world" as defined in the Railway Labor Act.

3. One of the basic purposes of the Railway Labor Act is to provide for prompt and orderly settlement of labor disputes (45 U.S.C. 151a). Accordingly, Section 2 Ninth (45 U.S.C. 152 Ninth) contemplates that the Board will certify the employee representative within 30 days from the time that its authority is invoked.

This policy can be advanced only by strict adherence to the general prohibition of judicial review until after a final administrative determination. Allowing earlier access to the courts would tend to frustrate the stated congressional purpose by delaying settlement of the disputes—as is amply demonstrated by the fact that, in the instant case, ten years have already passed since the Board's authority was first invoked.

4. Petitioner also claims that the decision below conflicts with *Shields* v. *Utah Idaho Central Railroad Co.*, 305 U.S. 177. In that case the Court permitted the maintenance of an action to enjoin a threatened criminal proceeding in which review was sought of a determination of the Interstate Commerce Commission that particular railway lines did not constitute an

[1] "App." refers to the Appendix to the appellants' brief in the court below.

interurban electric railway, with the result that the company was a "carrier" within the meaning of the Interstate Commerce Act and subject to that Act's criminal provisions. In *Switchmen's Union of North America* v. *National Mediation Board,* 320 U.S. 297, the Court, in holding that a certification by the Board was not directly reviewable, distinguished *Shields* on the ground that that "decision was placed on the traditional use of equity proceedings to enjoin criminal proceedings" (320 U.S. at 306). The Court also pointed out (p. 307) that *Shields* did not involve "railway labor disputes" but "transportation problems***[that] have quite a different tradition in federal law than those pertaining to carrier-employee relationships." The present case does not involve any attempt to enjoin a criminal proceeding and it is *Switchmen's Union,* not *Shields,* that governs it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

ROBERT V. ZENER,
Attorney.

OCTOBER 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court,
FILED
NOV 19 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1969

No. 558

HOUSTON H. FEASTER, individually and as Director, Alabama State Docks Department and the STATE OF ALABAMA,

Petitioners,

versus

UNITED STATES OF AMERICA and WARREN S. LANE, as Mediator, National Mediation Board,

Respondents.

BRIEF OF THE NORTH CAROLINA PORTS AUTHORITY AS AMICUS CURIAE.

ROBERT MORGAN
Attorney General of North Carolina
Justice Building
Raleigh, North Carolina

RALPH MOODY
Deputy Attorney General

BERNARD A. HARRELL
Assistant Attorney General

INDEX

	Page
STATEMENT OF INTEREST	1
ARGUMENT	3
A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHICH VITALLY AFFECTS THE RELATIONSHIP OF THE STATES TO THEIR EMPLOYEES AS WELL AS THE FEDERAL-STATE RELATIONSHIP.	
CONCLUSION	7
CERTIFICATE OF SERVICE	8

LIST OF AUTHORITIES

Cases:

California v. Taylor, 353 U. S. 553	4
Northwest Airline Company v. Jackson, 185 F. 2d 74	6
Pan American Airways v. United Brotherhood of Carpenters & Joiners, 324 F. 2d 217 (9th Cir. 1963)	6
Ports Authority v. Trust Co., 242 N. C. 416, 88 S.E. 2d 109	1
State v. Whitaker, 228 N. C. 352, aff'd, Whitaker v. State, 69 S. Ct. 251, 335 U. S. 525, 93 L. Ed. 212	5
United States, et al. v. Feaster, 410 F. 2d 1354 (5th Cir., 1969)	3
Virginia Ry. Co. v. System Federation No. 40, 57 S. Ct. 592, 300 U. S. 515, 81 L. Ed. 789	6

Page

Statutes:

Fair Labor Standards Act, 29 U.S.C., section 201 5

Labor Management Relations Act, 29 U.S.C., section 141 5

National Labor Relations Act, 29 U.S.C., section 152 (2) 5

North Carolina General Statutes:
143-216 1
143-228.1 1
143-223 2

Railway Labor Act, 45 U.S.C., section 151 (First) 3

Miscellaneous:

Report of Hearings of the Senate Committee on Interstate Commerce on S. 3266, 73rd Congress, Second Session 6

Supreme Court of the United States

OCTOBER TERM, 1969

No. 558

HOUSTON H. FEASTER, individually and as Director, Alabama State Docks Department and the STATE OF ALABAMA,

Petitioners,

versus

UNITED STATES OF AMERICA and WARREN S. LANE, as Mediator, National Mediation Board,

Respondents.

BRIEF OF THE NORTH CAROLINA PORTS AUTHORITY AS AMICUS CURIAE.

STATEMENT OF INTEREST

The North Carolina Ports Authority is a body politic and corporate created by the General Assembly of North Carolina for the purpose of promoting, developing and operating the harbors and seaports of the State so as to make expeditious and efficient the handling of water-borne commerce from and to any place in the State and other states and foreign countries. PORTS AUTHORITY v. TRUST CO., 242 N. C. 416, 88 S. E. 2d 109; N.C.G.S. 143-216 through 143-228.1.

Among other powers given to it in order to carry out its broad statutory purposes, the Ports Authority is empowered by statute to acquire, own and operate at its harbors and seaports a line of terminal railroads with all necessary equipment and appurtenances. N.C.G.S. 143-223.

The North Carolina Ports Authority has established and operates two port terminals, one located at Wilminton and the other at Morehead City. Both terminals have docks, berths, sheds and cargo handling facilities and equipment. Both terminals operate terminal railroads in conjunction with the port facilities. All rail interchange and switching is performed by personnel of the terminal railroad.

At the terminal in Wilmington, the Authority owns and maintains six miles of track. At Morehead City, the Authority owns and maintains three miles of track. Neither of these two railroad operations has ever been certified by the Interstate Commerce Commission. The services performed by the terminal railroads consist of switching railroad cars from one point to another within the terminal. Most of the rail mileage consists of sidings to which two line-haul carriers have access. No compensation is realized by either terminal railroad from the switching and interchanging. A standard charge is made when a car is moved cross-terminal to privately owned warehouses.

The terminal railroad at Wilmington has eleven full-time personnel. The railroad at Morehead City has only three employees.

As to terminal railroad employees, the North Carolina General Statutes 143-223 provides that:

> ". . . the Authority shall have the right and authority to make agreements as to scale of wages, seniority, and working conditions with locomotive engineers, locomotive firemen, switchmen and switch engine foremen and hostlers engaged in the operation of the terminal railroads provided for in this section, and the service and equipment pertinent thereto. And should the said Department exercise the authority herein given, then in such event it shall be the duty of the said Department to make such agreements with said employees hereinabove specified, in accordance with the act of Congress known as the Railroad Labor Act (U.S.C. Title 45, sections 151-163) as amended or as

> hereafter amended to the end that the same agreements as to seniority and working conditions will obtain as to said employees and the standard rate of pay be provided, as are in force relative to like employees of interstate railroads operating in the same territory with terminal railroads authorized hereby . . ."

At present time there is pending before the National Mediation Board (hereinafter called the N.M.B.) File No. C-3900, a petition filed by the International Longshoremen's Association (hereinafter called I.L.A.) for investigation of an alleged representation dispute among employees of the terminal railroads.

By "Findings Upon Investigation" dated November 4, 1969, the N.M.B. has found in file No. C-3900, that the North Carolina Ports Authority is subject to the jurisdiction of the Railway Labor Act and is within the jurisdiction of the N.M.B.

The N.M.B. in its findings cites the "under common control" language of Title 45, U.S.C., section 151 (First) and the decision of the Circuit Court of Appeals in UNITED STATES, ET AL. v. FEASTER, 410 F. 2d 1354 (5th Cir., 1969).

The North Carolina Ports Authority contends that the N.M.B. has no jurisdiction over its employees other than the terminal railroad employees. The N.M.B. ruling in FEASTER, supra, was to the effect that all employees of the Alabama Ports Authority were within its jurisdiction.

The decision of the Court in this case will directly and substantially effect the North Carolina Ports Authority and its two seaport terminals.

ARGUMENT

A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHICH VITALLY AFFECTS THE RELATIONSHIP OF THE STATES TO THEIR EMPLOYEES AS WELL AS THE FEDERAL-STATE RELATIONSHIP.

All employees at the North Carolina Port Terminals are employees of the State fully subject to the State's policy as to wages, hours, working conditions, workmen's compensation, retirement benefits and the many other facets which make up the employer-employee relationship.

Like the Alabama State Docks Department, however, the State of North Carolina and its Port Authority has recognized a distinction between its employees engaged essentially in the maritime functions of the port terminals and those employees working on the terminal railroads.

When the North Carolina General Assembly enacted the State Ports Authority Act in 1945, it provided that as to terminal railroad employees, the Authority would have the right to make agreements as to the scale of wages, seniority and working conditions with locomotive engineers, firemen, switchmen and other employees of the terminal railroad. The statute specifically provided that (G.S. 143-223):

> ". . . it shall be the duty of said Department to make such agreements with said employees hereinabove specified, in accordance with the act of Congress known as the Railroad Labor Act (U.S.C. Title 45, sections 151-163) . . . to the end that the same agreements will obtain to said employees and the standard rate of pay be provided, as are in force relative to like employees of interstate railroads operating in the same territory with terminal railroads authorized hereby . . ."

The Alabama Docks Department has treated its terminal railroad employees as being within that "state within a state" described by the Supreme Court in CALIFORNIA v. TAYLOR, 353 U. S. 553. The application of this special demarcation of railroad employees is seen in Petitioners' Appendix F, J, K and L.

In TAYLOR, the Court recognized that state-owned railroads form a vital link in the national transportation system

and that their uninterruped operation was of importance to the national flow of commerce.

It is conceded that the states, by engaging in interstate commerce by rail, have subjected certain of their employees to the power of Congress. However, the decision of the N.M.B. in the Petitioners' case, as affirmed by the Fifth Circuit Court of Appeals, extends the reach of the Railway Labor Act far beyond railway employees and invades the substantial right of the states to formulate and carry out policy with respect to its own employees.

In legislating in the labor relations field, Congress has, with the exception of the Railway Labor Act, consistently excluded public and state employees. This is manifested by the National Labor Relations Act, 29 U.S.C., section 152(2); the Labor Management Relations Act, 29 U.S.C., section 141; the Fair Labor Standards Act, 29 U.S.C., section 201. Further, it is generally recognized that the employer-employee relationship is subject to regulation by the state in the exercise of its police power. STATE v. WHITAKER, 228 N.C. 352, aff'd, WHITAKER v. STATE, 69 S. Ct. 251, 335 U. S. 525, 93 L. Ed. 212.

Consistent with its right, the states have adopted comprehensive statutes and policy for those of its employees not covered by act of Congress in the working relationship. All branches of the federal government have traditionally refrained from interference with the employer-employee relationship existing between the state and its employees.

Neither the legislative purpose or history of the Railway Labor Act supports the expanded definition of "carrier" to include state employees not engaged in carrier activities. Indeed, the sponsor of the Railway Labor Act, Joseph B. Eatman, testified that the definition of "carrier" was drawn so as not to go beyond carriers and their subsidiaries engaged in transportation (REPORT OF HEARINGS OF THE SENATE

COMMITTEE ON INTERSTATE COMMERCE ON S. 3266, 73rd CONGRESS).

The purpose of the Railway Labor Act is to provide a method of settling labor disputes throughout the railroad industry through an instrument of industry-wide government. VIRGINIA RY. CO. v. SYSTEM FEDERATION NO. 40, 57 S. Ct. 592, 300 U. S. 515, 81 L. Ed. 789; CALIFORNIA v. TAYLOR, supra.

The bulk of the workers at the Alabama Dock at Mobile are engaged in non-rail work either of a maritime or unrelated nature. To say the least, the relationship between the terminal railroad and the non-rail employees is tenuous.

As stated by the Eighth Circuit Court of Appeals in NORTHWEST AIRLINE COMPANY v. JACKSON, 185 F. 2d 74:

> "The Railway Labor Act was intended to apply only to transportation activities and that work which bears more than a tenuous, negligible and remote relationship to the transportation activities. It was not intended to apply to all work, regardless of its connection to transportation, merely because the company carrying on the work included carrier activities within its company functions."

In this respect, see also, PAN AMERICAN AIRWAYS v. UNITED BROTHERHOOD OF CARPENTERS & JOINERS, 324 F. 2d 217 (9th Cir. 1963) where the Court reasoned that the mere fact that an employer may own a railroad does not convert all of its employees into transportation workers.

The ruling of the N.M.B. and the refusal of the court below to review that ruling leaves the N.M.B. as the final arbiter in determining the scope of the Railway Labor Act. The court's decision opens up the Act for arbitrary interpretation without review.

We disagree with the characterization of the court below

that the error of the N.M.B. is not of "magna or summa quality". Substantial rights of the sovereign states are involved as well as the relationship between the federal government and the states.

This Court should review and decide the vital questions involved without waiting for the exhaustion of the administrative process.

CONCLUSION

For the reasons foregoing, the petition for writ of certiorari should be granted so that the substantial federal questions may be settled.

Respectfully submitted,

ROBERT MORGAN
Attorney General of North Carolina
Justice Building
Raleigh, North Carolina 27602

RALPH MOODY
Deputy Attorney General

BERNARD A. HARRELL
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Ralph Moody, Deputy Attorney General of the State of North Carolina, and one of the attorneys for the North Carolina Ports Authority, amicus curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 14th day of November 1969, I served copies of the foregoing Brief of the North Carolina Ports Authority on the several parties, as follows:

On the United States and on Warren S. Lane, as Mediator, National Mediation Board, by mailing a copy thereof in a duly addressed envelope with air mail postage prepaid to Charles S. Whitespunner, Esquire, United States Attorney for the Southern District of Alabama, at Room 311, Federal Building, Mobile, Alabama, and by mailing a copy in a duly addressed envelope with air mail postage prepaid to The Solicitor General, Department of Justice, Washington, D. C., 20530.

On Houston H. Feaster, individually and as Director Alabama State Docks Department, and on the State of Alabama by mailing a copy thereof in a duly addressed envelope with air mail postage prepaid to Willis C. Darby, Jr., Esquire, Post Office Box 2565, Mobile, Alabama, 36601, and by mailing a copy thereof in a duly addressed envelope with air mail postage prepaid to Honorable MacDonald Gallion, Attorney General of the State of Alabama, Montgomery, Alabama.

RALPH MOODY
Deputy Attorney General
State of North Carolina
Justice Building
Raleigh, North Carolina 27602